

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

331

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United States Court of Appeals for the
District of Columbia

OCTOBER TERM, 1935

No. 6577

795

THE MIAMI BEACH JOCKEY CLUB, INC.,
APPELLANT,

vs.

GEORGE H. DERN, AS SECRETARY OF WAR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

United States Court of Appeals for the District of Columbia

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United States Court of Appeals for the District of Columbia

No. 6577.

THE MIAMI BEACH JOCKEY CLUB, INC., Appellant,

vs.

GEORGE H. DERN AS SECRETARY OF WAR.

a Supreme Court of the District of Columbia.

In Equity.

No. 53979.

THE MIAMI BEACH JOCKEY CLUB, INC., Plaintiff,

vs.

PATRICK JAY HURLEY, Secretary of War of the United States, and LYTLE BROWN, Chief of Engineers of the United States Army, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill for Injunction.

Filed February 4, 1932.

In the Supreme Court of the District of Columbia,

Holding an Equity Court.

Equity No. 53979.

THE MIAMI BEACH JOCKEY CLUB, INC., Plaintiff,

vs.

PATRICK JAY HURLEY, Secretary of War of the United States, and LYTLE BROWN, Chief of Engineers of the United States Army, Defendants.

The bill of complaint of the above named plaintiff respectfully shows to the court:

1. That plaintiff is a corporation organized and existing under the laws of the State of Florida, and having its principal office and place of business at the City of Miami in said State.

2. That the defendant Patrick Jay Hurley is and during all the times herein mentioned was the Secretary of War of the United States, duly nominated, confirmed and acting as such.

3. That the defendant Lytle Brown, during all the times herein mentioned was and still is the Chief of Engineers of the United States Army, duly nominated, confirmed and acting as such.

4. That the plaintiff during all the times herein mentioned was and still is the owner of certain lands under water in the northerly portion of Biscayne Bay, adjacent to the 79th Street causeway between the City of Miami and Miami Beach, Florida, the precise location and boundaries of which are shown by the description thereof hereto annexed and marked Schedule A.

2 5. That plaintiff's title to said land was derived through mesne conveyances from the trustees of the Internal Improvement Fund of the State of Florida.

6. That previous to the acquisition of title to said lands, one LeGro Properties, Inc., a corporation duly organized and existing under the laws of the State of Florida, and

having its principal office and place of business in Miami aforesaid, made application to the Secretary of War for a permit to bulkhead and fill in the lands hereinabove mentioned, which application later, and on the first day of July, 1931, the Secretary of War attempted to grant, with leave to fill in and construct an island over the area covered by said land under water.

7. That on the twenty-sixth day of June, 1931, said LeGro Properties, Inc., duly conveyed said land to Municipal Land Company, a corporation duly organized and existing under the laws of the State of Florida, and having its principal office and place of business in Miami aforesaid, and the latter on the same day duly conveyed said land to this plaintiff.

8. That on the fifth of August, 1931, an organization known as the Indian Creek Club filed a petition with said Secretary of War, requesting a public hearing on the question whether said alleged permit which said Secretary of War had attempted to grant, to construct and fill in said island, should not be revoked, and that thereupon said Secretary of War granted such rehearing and set the same for September fourth, 1931. That said hearing was held on September fourth and fifth, 1931, at Miami, Florida, and was presided over by Colonel L. V. Frazier, then the United States District Engineer stationed in Florida, and a large volume of testimony was introduced upon said question, and that on or about October second, 1931, said Secretary of War attempted to revoke, and issued a
3 paper purporting to revoke said alleged permit.

9. That Section 1 of Title 33 of the United States Code, under which the proceedings taken by the Secretary of War in attempting to issue and to revoke the alleged permit hereinabove described, and the alleged revocation thereof, has no application to the part of Biscayne Bay in question, and the Secretary of War had no jurisdiction over the waters covering the land hereinabove described, or any part thereof, under said statute, or under any other statute, law or provision of the Constitution of the United States or otherwise howsoever, for the following reasons, viz:

(a) The site of the proposed island and the part of the bay for miles adjacent to it have never been used and are not used in their ordinary condition as highways for com-

merce, over which trade and travel are or may be conducted in the customary mode of trade and travel on water.

(b) The water for miles adjacent to the said site and covering it have never been and are not navigable in fact and therefore are not navigable in law.

(c) Neither the water covering the site of the island nor the water for miles adjacent thereto has ever afforded and does not afford a channel for useful commerce.

(d) The site of said island and the water for miles adjacent thereto are not susceptible in the ordinary condition of said water for use as a highway of commerce.

(e) The site of said island and the water for miles adjacent thereto have never been used and are not now being used for navigation of any kind except in a very limited way and at irregular and long intervals for small pleasure craft, and by barges of shallow draft in purely local transfers, which does not make said waters navigable within the meaning of the Constitution of the United States.

4 (f) The site of the proposed island and the adjacent waters for miles around have never been and are not now susceptible of carrying commerce between the States or between this country and foreign nations, and, therefore, these waters are not navigable within the meaning of the Constitution of the United States.

(g) The northerly part of Biscayne Bay, which forms a link in the Intracoastal Waterway, is about three hundred and seventy-five miles distant from the nearest point in an adjacent State. That for said entire distance the Atlantic Ocean, with an unlimited depth, and the Intercoastal Waterway, run parallel. That said Waterway has had and has a controlling depth of only three to three-and-a-half feet. That for so great a distance transportation on the unlimited ocean depth has been, is, and will be so much cheaper than that on a shallow three-and-a-half foot stream that freight and passengers transported by water from or to Biscayne Bay as far as the northerly State line of Florida have been carried by the ocean and not said Waterway, and that the ocean will continue to be used for such purpose and said Waterway will not be able to compete with it for traffic between the States and will not be a useful highway for interstate commerce. That a stream with a depth of only three-and-a-half feet might be used for short distances, in a limited and irregular way, for floating longs and transporting rock, sand and gravel, where it was the only water-

way available, and there were no railroad facilities, but not for long distances or where deep water transportation is available.

That all water transportation between Biscayne Bay and foreign countries is by ocean and that the northern portion of Biscayne Bay is far too shallow to permit its being traversed by ocean-going vessels.

5 10. That even if the part of Biscayne Bay where said island would be filled in did constitute navigable waters of the United States (which it does not, as hereinabove shown), the right of the Secretary of War would be limited to the control thereof so far as may be necessary to insure their free navigation, and the attempted interference by said Secretary of War and said Chief of Engineers with the right of this plaintiff to fill in and construct said island was not and is not within the jurisdiction of either of said officials for the following reasons, viz:

(a) The water where the island is to be constructed is about two and three-fourths miles wide. The westerly side of the island would be about three-fourths of a mile east from the easterly shore of the mainland, and about two miles west of the westerly line of Miami Beach. The water in all that portion of Biscayne Bay varies from a minimum depth of two feet to a maximum of six feet at mean low water. There are many times the distances needed, both to the west and to the east of the proposed island, for any channels which ever have been used or are being used, or which ever will be used for any navigation to which these waters, in their ordinary condition, are adapted, or of which they are susceptible. That said island would be filled in adjacent to and constructed so that the northerly line of the northernmost of the three causeways across Biscayne Bay would be made the southerly line and boundary of the said island. Said northernmost or City of Miami 79th Street causeway has two openings—one near the westerly end and the mainland, and the other near the easterly end and Miami Beach—so that the only navigation through the Bay would be through these two openings in said causeway, and there are many times the distances required between said island and both of said openings for any chan-

6 nels which ever have been or are being or which ever will be used for the navigation of said part of the Bay where said causeway crosses the same, and where

said island would be constructed. That as free navigation as now exists would be insured after the filling in and construction of said island and that, therefore, it is not necessary for said Secretary of War or said Chief of Engineers to attempt to prohibit or interfere with the filling in or construction of said island.

(b) That said Secretary of War and said Chief of Engineers have not, nor has any of them, jurisdiction to interfere with this plaintiff, the owner of the lands under water hereinabove described, in its filling in and constructing said island, because said construction and filling in of said island neither destroys nor seriously interferes with navigation and does not impair the same, and any attempt of the said Secretary of War or said Chief of Engineers to interfere with such use of plaintiff's said land would be an arbitrary destruction of the rights of this plaintiff.

(c) That the filling in and construction of said island is the exercise of a right which owners of submerged lands have been permitted to enjoy and have enjoyed and exercised throughout Biscayne Bay, by the filling in of far the greater part of what now constitutes that large area of land known as Miami Beach, which formerly was a mango swamp covered with water, and by the filling in and construction of islands throughout Biscayne Bay, both in the northerly part thereof, where the island in question here is to be filled in, where an island several times the size of this proposed island has been constructed, and adjacent to both the middle and the southern causeways, and much nearer the main 25-foot channel in said bay than the proposed island would or need be to any channel on either side thereof.

7 11. That said Secretary of War and said Chief of Engineers, when they granted the permit to construct and fill in said island, on the 1st day of July, 1931 completely exercised their judgment and discretion in the performance of their duty to determine whether or not said island would destroy or seriously interfere with navigation; that their authority in said matter is and was wholly statutory and quasi-judicial, and they were given and have no right to reconsider or recall their action or to revoke said permit, and when said permit was granted it constituted and was an act performed by them, beyond their review or recall, on which account their attempt to

revoke said permit was beyond their jurisdiction and their attempted act of revocation was null, void and of no effect. That the conditions as to the effect of the construction of said island upon navigation were the same at the time that said Secretary of War attempted to revoke said permit that they were when he granted the same.

12. That this plaintiff purchased said site of said proposed island only five days before the permit to construct the same was granted by said Secretary of War and in anticipation that the same would be granted, and that it made large payments upon the purchase price of said land, and that it incurred other large expenses and devoted much time and effort towards the construction of said island after the granting, on July 1st, 1931, and before the attempted revocation of said permit on the 2nd of October, 1931, in the confidence, justified by the granting of said permit by said Secretary of War and said Chief of Engineers, that the construction would be permitted, which in effect constituted a contract between said officials and this plaintiff, and plaintiff thereby acquired vested rights of great value, and said officials should not, in good faith, or in derogation of said contract, or in arbitrary destruction of plaintiff's said vested rights, attempt to interfere with, delay, or in any way impede the construction of said island, and plaintiff's vested and contractual rights, which accrued through such permit and contract, would be jeopardized, if not destroyed, through any such attempt, and said officials are estopped from so interfering.

13. That said island, when constructed, will be of great value to this plaintiff, to the community in which it is situate, and in creating land of great value for taxation to the municipality, the State and the Federal Government. Moreover, the construction of said island will be of immediate and great benefit to the community in which it is situate in relieving unemployment; that said construction of said island and of the improvements plaintiff plans to make thereon will cost a very large sum, to wit, about the sum of \$2,000,000.00, far the greater part of which will be paid for labor, and plaintiff is ready to begin such construction as soon as the right to construct said island is assured by judgment of this court granting the relief herein asked.

14. That said Secretary of War and said Chief of Engineers, by said attempted revocation of said permit, have

asserted and still assert thereby a wholly unfounded claim to the right to prohibit the construction of said island, which claim constitutes a cloud upon the right of this plaintiff to construct the same, and renders it impossible for this plaintiff to secure the capital necessary for such construction until such cloud is removed by the granting of the relief herein asked, and that plaintiff is assured of such capital immediately upon the removal of said cloud upon its said right.

15. That the construction of said island would not alone be no injury to navigation, but, on the contrary, it can be made a substantial improvement thereto. The
9 United States Government has adopted a project for a channel for the Intracoastal Waterway from Jacksonville to Miami, Florida, of 8 feet in depth and 100 feet in width, and that such a channel will run in a general northerly and southerly direction through Biscayne Bay; that the earth and rock excavated from Biscayne Bay could be taken from that part thereof nearest to the site of said island, selected by said Chief of Engineers for said channel, and this plaintiff hereby offers to dredge the earth and rock from that part thereof, under supervision of said Chief of Engineers, and so as (to the extent of such excavation needed for the construction of said island) to dredge said channel for the United States Government, free of charge, subject to the securing by said Government of the right of way. Said dredging which this plaintiff hereby offers to do would be a considerable part of that required in the northerly portion of said Biscayne Bay for the completion of said channel, and would constitute and make a large saving for said Government, and a great aid and advantage to navigation through said northerly portion of said Bay.

16. That the damage which this plaintiff is sustaining and will sustain through the said assertion of said unfounded and baseless claim of said Secretary of War and said Chief of Engineers to prohibit the construction of said island constitutes and is an irreparable injury for which plaintiff has no adequate remedy at law.

Wherefore, this plaintiff prays the judgment of this Court—

1. That the site of the proposed island is not in navigable waters, within the meaning of the Constitution of the United States.

2. That said site and the waters adjacent thereto
10 have never been, are not now and will not in the
future be used in their ordinary condition as high-
ways for commerce over which trade and travel are or may
be conducted in the customary mode of trade and travel on
water; and said waters are not navigable in fact and there-
fore are not navigable in law; and that said waters do not
afford a channel for useful commerce; and that said waters
are not susceptible, in their ordinary condition, for use as
a highway for commerce.

3. That the said site and the adjacent waters have never
been used, are not being used and will not in the future be
used for navigation, except by small pleasure craft, and
by barges of shallow draft in purely local transfers, which
does not make them navigable waters.

4. That said site and the adjacent waters are not sus-
ceptible of carrying commerce between the States or be-
tween this country and foreign nations, and have not been
used and will not be used for such commerce, and therefore
these waters are not navigable.

5. That it is not necessary to prohibit the construction
of said island to insure free navigation in that portion of
said Biscayne Bay.

6. That the construction of said island would not seri-
ously interfere with, much less destroy, navigation, and that
any attempt of said Secretary of War or said Chief of
Engineers to prevent the construction thereof would arbi-
trarily destroy the rights of this plaintiff in said land.

7. That this plaintiff in filling in said island is exercis-
ing a right accorded owners of submerged lands throughout
our history, and throughout said bay, and particularly in
the parts thereof where there is navigation in fact, and
much nearer existing navigable channels than the site of
said island.

11 8. That through the granting of said permit and
by making large expenditures and by devoting much
time and effort to the preliminary work involved in the
construction of said island, this plaintiff acquired vested
rights to construct said island and in effect a contract with
said Secretary of War, permitting plaintiff to fill in the
said island, and that thereby said Secretary of War is es-
topped from interfering with said filling in of said island.

9. That the judgment and discretion of said Secretary
of War was completely exercised in his determining, on

the 1st of July, 1931, that said island would not destroy or seriously interfere with navigation, and it was and is beyond his power to review or recall the same, and that no power to so reconsider or recall has been vested in him by statute or otherwise.

10. That the attempted and threatened interference of said Secretary of War and said Chief of Engineers with plaintiff's rights, as the owner of said land, to construct said island has inflicted, is inflicting and will continue to inflict irreparable loss and injury on this plaintiff, and that plaintiff has no adequate remedy at law for such loss or injury.

11. That plaintiff is entitled to and is granted a permanent injunction restraining said Secretary of War and said Chief of Engineers, their servants and agents, from in any manner interfering with, impeding or delaying the said construction of said island.

12. And for such other, further or different judgment, order or relief as to this court may seem just and equitable in the premises.

THE MIAMI BEACH JOCKEY CLUB, Inc.,
By J. M. SMOOT,
President.

WILTON J. LAMBERT,
Attorney for Plaintiff.

R. H. YEATMAN,
Attorney for Plaintiff.

12 DISTRICT OF COLUMBIA,
City of Washington, ss:

Joseph M. Smoot, being first duly sworn, deposes and says that he is an officer, to wit, the President of The Miami Beach Jockey Club, Inc., the plaintiff herein; that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof; that the matters and things therein stated as upon personal knowledge are true, and that the matters and things therein stated as upon information and belief, he believes to be true.

J. M. SMOOT.

Subscribed and sworn to before me this 28th day of January, 1932.

[SEAL.]

CHARLES R. BURHANS,
Notary Public.

Schedule A.

All that tract or parcel of land situate, lying and being in the County of Dade, State of Florida, to wit:

Beginning at the Northwest corner of Section 9, Township 53 South, Range 42 East, thence run South, 1 degree 37 minutes, 8 seconds East, along the section line between Sections 8 and 9, 2351.65 feet to the point of beginning; thence run South, 1 degree, 37 minutes, 8 seconds East, 285 feet to the northern boundary of the right of way of the Northeast 79th Street Causeway, as shown on plat recorded in Plat Book 25, page 70, of the Public Records of Dade County Florida; thence run North, 88 degrees, 41 minutes, 24 seconds East, along said right of way 1,060 feet; thence run North, 1 degree, 37 minutes, 8 seconds West, 285 feet; thence run South, 88 degrees, 41 minutes, 24 seconds West, 1,060 feet to the point of beginning; containing 6.94 acres, more or less.

Joint and Several Answer of Defendants.

Filed February 24, 1932.

* * * * *

The defendants, Patrick J. Hurley, Secretary of War of the United States, and Lytle Brown, Chief of Engineers of the United States Army, file this their joint and several answer to the bill of complaint filed herein, and reserve unto themselves the benefits of all manner of objections and exceptions to the errors and insufficiencies of the bill filed herein, and the jurisdiction of the Court in the premises, nevertheless answering so much and such parts of the bill of complaint as they are advised it is material or necessary for them to make answer unto, that is to say:

1. The defendants have not sufficient knowledge or information on which to form a belief as to the allegations of Paragraph One of the bill of complaint.

2. The allegations of Paragraph Two of the bill of complaint are admitted.

3. The allegations of Paragraph Three of the bill of complaint are admitted.

4. The defendants have not sufficient knowledge or information to form a belief as to the allegations and averments of Paragraph Four of the bill of complaint.

5. The defendants have not sufficient knowledge or information to form a belief as to the allegations and averments of Paragraph Five of the bill of complaint.

6. By way of answering Paragraph Six of the bill of complaint, the defendants say that they have no knowledge or information sufficient to form a belief as to whether the plaintiff ever acquired title to the lands referred to or to any other lands, and therefore demand strict proof as to this averment.

Defendants admit that the Le Gro Properties Incorporated, a Florida corporation, with its principal office and place of business in Miami, Florida, made application to bulkhead and fill in the land covered by Schedule A of the bill of complaint, as well as an area of approximately 189.94 acres to the north of said tract, both parcels of land being under water. The defendants further aver that on, to wit, July 1, 1931, the Secretary of War granted the requests in the application aforementioned and authorized the issuance of a permit to fill in and construct an island over the area covered by said tracts of land. Defendants further aver that such a permit was issued. Further answering this paragraph, defendants aver that no public hearing was held in the matter of the application for said permit.

7. The defendants have not sufficient knowledge or information to form a belief as to the allegations contained in this paragraph of the bill of complaint.

8. The defendants, answering Paragraph Eight of the bill of complaint, allege that on, to wit, August 5, 1931, the Indian Creek Club, referred to in this paragraph of the bill, filed a petition with the Secretary of War requesting a public hearing on the question as to whether the permit which the Secretary of War had granted should not be revoked. Defendants admit that the Secretary of War granted the hearing requested and set same for September 4, 1931. Defendants further aver that a public hearing was had on this matter on September 4 and 5, 1931, at Miami, Florida, and that said hearing was presided over by the officer indicated; that a large volume of testimony was taken at the hearing and that on, to wit,

October 2, 1931, the Secretary of War revoked the permit which he had granted on, to wit, July 1, 1931.

9. The defendants, answering Paragraph Nine, allege that the proceedings taken by the Secretary of War with respect to the issuance and revocation of the permit in question were *had not* pursuant to Section 1, Title 33, of the United States Code, as contended by the plaintiff, but pursuant to the provisions of Section 10, Act of March 3rd, 1899 (30 Stat. 1151), Section 403, Title 33, United States Code. Defendants further aver that this Act of Congress was applicable to the part of Biscayne Bay involved and to the proposed development of the plaintiff. Defendants further aver that the waters of Biscayne Bay, including the waters over the land which was to be used in the proposed development, were at all times mentioned in the bill of complaint, and are now, navigable waters, and the Secretary of War had and still has jurisdiction thereover. Defendants deny the allegations and conclusions of subdivision (a) to (d), inclusive, of this paragraph.

Defendants deny the allegation of subdivision (e) of this paragraph, as set forth in the bill of complaint, and state that the area in question has been used and is now being used by pleasure crafts and by barges and other vessels for commercial purposes, and that said use makes the waters navigable in fact and law within the meaning of the Constitution of the United States. Defendants deny the allegations contained in subdivision (f) of this paragraph of the bill of complaint. Answering subdivision (g), the defendants admit the allegations and averments

16 contained in the first two sentences of this paragraph. Defendants further admit that the Waterway referred to has had a controlling depth of three and one-half feet, but state that the present controlling depth is at least four feet. Defendants are informed and believe and therefore aver that under the development of the Intracoastal Waterway, which is now being carried on by the United States Government, the controlling depth of the Waterway will be at least eight feet. Defendants deny that all water transportation between Biscayne Bay and foreign countries is by ocean, and further deny that the northern part of said bay is far too shallow to permit its being traversed by ocean-going vessels. The remaining matter set forth in this subdivision, the defendants are in-

Subscribed and sworn to before me this 23d day of February, 1932.

[SEAL.]

FRANK M. HOADLEY,
Notary Public, D. C.

My commission expires June 24, 1935.

19 DISTRICT OF COLUMBIA, ss:

Lytle Brown, as Chief of Engineers, War Department, being first duly sworn, deposes and says that he is one of the respondents named in the above entitled action, and that he has read the foregoing answer by him subscribed as Lytle Brown, Chief of Engineers, War Department, and knows the contents thereof and that the matters and things therein he verily believes to be true.

LYTLE BROWN,
Chief of Engineers, War Department.

Subscribed and sworn to before me this 20th day of February, 1932.

[SEAL.]

JOHN F. BRADY,
Notary Public, D. C.

My commission expires June 8, 1932.

Order Substituting Defendant.

Filed August 28, 1933.

* * * * *

Upon consideration of the oral motion of counsel for the plaintiff in the above entitled cause, and the consent of counsel for defendants herein, it is by the Court this 28th day of August, 1933, adjudged, ordered and decreed that George H. Dern, Secretary of War of the United States, be, and he hereby is, substituted as party defendant in the above entitled cause in the place and stead of Patrick J. Hurley.

DANIEL W. O'DONOGHUE,
Justice.

I consent to the above.

J. J. WILSON,
Attorney for Defendants,
Asst. U. S. Atty., D. C.

20 *Order Dismissing Bill as to Defendant Lytle Brown,*
 Chief of Engineers.

Filed October 31, 1934.

On motion of the United States Attorney, attorney for the defendants in the above entitled cause, and it appearing that the defendant, Lytle Brown, sued herein in his official capacity as Chief of Engineers of the United States Army, is no longer the incumbent of that office, having on October 18, 1933, been succeeded by Edward M. Markham, who is now the duly appointed, qualified and acting Chief of Engineers of the United States Army; and it further appearing that no substitution of said Markham for said Brown has been made, and that the time in which such substitution might be made, as fixed by statute, has now expired, it is, this 31st day of October, 1934,

Ordered, adjudged and decreed that the said suit has abated as to said Lytle Brown, Chief of Engineers, United States Army, and that the same be and it hereby is dismissed as to said defendant.

JOSEPH W. COX,
Justice.

Findings of Fact and Conclusions of Law.

Filed June 26, 1935.

Findings of Fact.

I.

Under date of April 30, 1931, LeGro Properties, Inc., a Florida corporation, made application to the District Engineer, United States Corps of Engineers, at Jacksonville, Florida, as the representative of the Secretary of War, for a permit for dredging, filling, bulkheading and other work necessary for the construction of an island north and appurtenant to the Seventy-ninth Street

IV.

It was the purpose of the Miami Beach Jockey Club to erect upon the island, when constructed, a complete racing plant, consisting of a grandstand seventy-five feet high, a club-house, stables, an administration building, a paddock and a superintendent's home.

V.

About one month after the issuance of the said permit for the building of the proposed island, protests against the project were received, and on August 5, 1931, the Indian Creek Club filed a petition with the Secretary of War for a public hearing to determine whether the said permit should be revoked. The Secretary granted the hearing, and it was held at Miami, Florida, on September 4th and 5th, 1931, at which all parties in interest were afforded an opportunity to present evidence.

The record made of such hearing was reviewed by the then Chief of Engineers, who, under date of October 1, 1931, made report thereon to the Secretary of War, recommending that the permit be revoked. See Defendant's Exhibit "A."

This recommendation was approved by the Acting Secretary of War. Thereupon, the Chief of Engineers, under date of October 5, 1931, notified the Division Engineer at New Orleans, Louisiana, and instructed him to inform the LeGro Properties, Inc., that the Acting Secretary of War had revoked the permit. This information was given the applicant by letter of the Division Engineer dated October 8, 1931, addressed to it.

The record of the said hearings was not introduced at the hearing in this case before this court.

VI.

No contract for the construction of the proposed island was entered into and no construction work was ever done.

VII.

The waters of Biscayne Bay are tidal waters; the entire bay is accessible from the ocean. The mean low water depths of the bay are from thirteen feet to one foot; in that part of the bay south of the Main Causeway (Miami

Causeway) the depths generally are greater than north of that causeway. In the immediate vicinity and at the site of the proposed island the depth is four to six feet.

VIII.

Prior to the year 1895, by use of Hawk Channel, an inside passage permitting a draft of about 12 feet from Cape Florida, traffic passed from this region to and from Key West in light sailing boats; that to Key West was transhipped there in steamers and went north. In 1894 there was shipped out from Biscayne Bay and the Keys to the south a considerable amount of tropical fruits, vegetables and other products; tonnage coming in aggregated 3,985 tons; a large fleet of pleasure vessels also used the bay. At that time the landing place was in or near the mouth of the Miami River. Through the port of Miami in 1899 there passed 10,945 passengers and 21,000 tons of freight, in vessels of a draft of $8\frac{1}{2}$ to $10\frac{1}{2}$ feet, belonging to the Florida East Coast Steamship Company, which ran from Miami to Key West, Havana and Nassau.

There was also at that time commerce out of Lemon City, which is about two miles south of the 79th Street Causeway.

Later, about 1902, the United States cut through an 18 foot channel, subsequently made 25 feet, and now being excavated to 30 feet. This is designated as the Main Channel.

IX.

25 During the year 1925, when, due to the congested conditions on the railroads in Florida, an embargo against rail shipments was in effect, the Intracoastal Waterway, Jacksonville to Miami, was availed of to bring into Miami and vicinity building materials and merchandise from the north. This waterway, which then was five feet deep by 50 feet wide, and in some places the controlling depth but $3\frac{1}{2}$ feet, passed close to the site of the proposed island. In that year there passed through this waterway 703 thousand tons, of which 200,000 tons were shell, 440,000 tons rock.

In 1931 there was transported through this waterway from Miami to Ft. Lauderdale, Florida, minerals, oil and fuel amounting to 30,000 tons which came in tankers from the Gulf Coast and was transferred to barges. In that year

1,620 motor vessels drawing 5 feet and 366 barges traversed the waterway northbound; southbound, 1,620 motor vessels and 325 barges. In 1932, 38,529 vessels of drafts of 6 feet to 3, northbound, and the same number southbound; the total tonnage of these was 324,141; 28,041 were fishing boats of 66,413 tons; yachts, of five-foot draft, 10; four-foot draft, 125; three-foot draft, 215. Numerous fishing boats and shrimp boats operate from all these ports along the Florida ports and go outside to fish. They gather the fish and food there which comes to the shore to be shipped by rail to the northern markets. Pleasure boats from other states have traversed the waterway from Jacksonville to Miami.

X.

In 1927 Congress authorized a channel 8 feet by 100 feet through Biscayne Bay as a part of the Intracoastal Waterway. In 1929 the rights of the Florida East Coast Canal Company, which constituted a part of the waterway north of Biscayne Bay, were transferred to the United States, whereupon the government did maintenance dredging in that waterway, and opened it up all the way through to the St. John's River. Following that, began the improvement of the new waterway, 8 by 100 feet, and which was to have been completed shortly after the hearing in this case was held (November, 1934).

XI.

There has been projected and authorized by Congress what is known as "The Intracoastal Waterway, Boston, Massachusetts, to the Rio Grande". The channel through Biscayne Bay, Florida, is a part of that waterway. At the present time, the waterway from the Delaware River to Key West, Florida, is blocked only between Charleston, South Carolina, and Wilmington, North Carolina. That will be opened within the present year; this will produce a continuous intracoastal waterway from the Delaware River to Miami. The channel of this waterway in Biscayne Bay will pass about 300 feet from the site of the proposed island.

XII.

In a report, dated January 23, 1923, of the District Engineer at Jacksonville, Florida, to the Chief of Engineers, on the subject of the then proposed larger intracoastal

waterway from Jacksonville to Miami, it was said that the total value of exports in 1925 from the territory tributary to the waterway would amount to 30 million dollars; the tonnage inbound and outbound, 1,380,000, of a value of 70 million dollars.

This traffic could move over the waterway at a considerable saving in transportation costs as compared to rail rates.

XIII.

That part of Biscayne Bay wherein the site of the proposed island lies is suitable and could be used as a taking off and landing place for hydroplanes and amphibian planes. The construction of the island and of the race-track plant with its proposed grand-stand of a height of 75 feet would interfere with and constitute an obstruction to such use.

27

XIV.

Under a contract, Plaintiff's Exhibit No. 7, entered into October 15, 1932, more than a year after the revocation of the permit to LeGro Properties, Inc., a contract for dredging an eight-foot channel in Biscayne Bay was entered into between the United States and Arundel Corporation. Said contract provides:

"In the Biscayne Bay section, except for the extreme northerly and southerly portions, the excavated material shall be transported and deposited in the open waters of Biscayne Bay on the east or west side of the channel, as directed by the contracting officer. The minimum distance between the base of the spoil bank and the adjacent edge of the dredged channel shall be not less than 1,000 feet, except at places where the proximity of the shore line or other cause renders inadvisable the deposit of material at a distance as great as 1,000 feet from the adjacent edge of the channel.

"The location of spoil areas and the minimum allowable distances to the base of the spoil banks are shown on the maps referred to in paragraph 6.

"In order to permit access to shore landings and important waterways, and to provide adequate openings opposite drainage ditches, openings through the deposited material shall be left at such places as may be designated by

the contracting officer, the number of such openings not to exceed an average of two per mile.”

Pursuant to that contract excavating and dredging and dumping of material had been carried on to substantial completion at the time of trial.

Conclusions of Law.

I.

Biscayne Bay is a navigable body of water subject to control of the United States in the interest of navigation; and in its natural state is susceptible of navigation and of use as a highway for commerce between the states, and has been and is now being so used.

28

II.

The permit issued to LeGro Properties, Inc., for the construction of an island was a revocable permit, conferred no vested rights as against the United States, and was subject to revocation by the Secretary of War.

III.

The action of the Secretary of War in revoking the permit was in the exercise of power and authority vested in him by the Congress, and was in the exercise of judgment and discretion lawfully conferred, and was not arbitrary or capricious.

June 26, 1935.

JOSEPH W. COX,
Justice.

*Request by Plaintiff for Findings of Fact and Conclusions
of Law.*

Filed June 26, 1935.

* * * * *

Comes now Miami Beach Jockey Club, Inc., the plaintiff in the above entitled cause, and hereby requests the Court that, in rendering and making its judgment in the above

entitled cause, said Court make the annexed findings of fact and conclusions of law.

Dated this 26th day of June, 1935.

S. WALLACE DEMPSEY,
Counsel for Plaintiff.
WILTON J. LAMBERT,
Attorney for Plaintiff.

* * * * *

The above entitled action having been brought to trial and having been tried by the undersigned, one of the Justices of the Supreme Court of the District of Columbia, he now hereby makes the following findings of fact
29 and conclusions of law, viz:

Findings of Fact.

Upon the trial of the cause, certain of the facts were stipulated by plaintiff and defendant; and the said facts as so stipulated and as they appear in Plaintiff's Ex. "A" and are also transcribed in the record are hereby found by me as facts herein.

Conclusions of Law.

1. That the site of the proposed island is not in navigable waters, within the meaning of the Constitution or the laws of the United States;

2. That the waters covering the site of said proposed island are not navigable in law, and are not navigable waters of the United States, and neither the United States or the Secretary of War has any jurisdiction over the same;

3. That the attempt of the defendant, the Secretary of War, to prevent the filling in of the proposed island has no real or substantial relation to the control of navigation or appropriateness to that end, and is an arbitrary attempt to destroy the rights of plaintiff as the owner of the submerged or swamp lands, which constitute the site of said proposed island, constructing which island does not involve the excavating or filling in of the Intracoastal Waterway or canal;

4. That the filling of said island is not prohibited by § 10 of 30 United States Statutes, 1151, and as said sec-

tion is the sole authority which the Secretary of War has to prohibit or interfere with such filling in by plaintiff of said island, he is without such authority;

5. That said island, if filled in, would not create any obstruction to the navigable capacity of the Intracoastal Waterway, and the filling in thereof cannot therefore be prohibited.

30 6. That the filling of said island did not and would not cause unreasonable obstruction to the free navigation of said Intracoastal Waterway, which was the sole ground for revocation reserved in said permit, and the Secretary of War had no ground or right to revoke the permit to fill the same in;

7. That through the granting of said permit and by making large expenditures and by devoting much time and effort to the preliminary work involved in the construction of said island, this plaintiff acquired vested rights (subject to certain exceptions none of which are involved here) to construct said island and in effect a contract with said Secretary of War, permitting plaintiff to fill in the said island, and that thereby said Secretary of War is estopped from interfering with said filling in of said island;

8. That the judgment and discretion of said Secretary of War was completely exercised in his determining, on the 1st of July, 1931, that said island would not destroy or seriously interfere with navigation, and it was and is beyond his power to review or recall the same, and that no power to so reconsider or recall has been vested in him by statute or otherwise;

9. That the attempted and threatened interference of said Secretary of War and said Chief of Engineers with plaintiff's rights, as the owner of said land, to construct said island, has inflicted, is inflicting and will continue to inflict irreparable loss and injury on this plaintiff, and that plaintiff has no adequate remedy at law for such loss or injury; and

10. That plaintiff is entitled to and is granted a permanent injunction restraining said Secretary of War and said Chief of Engineers, their servants and agents, from
in any manner interfering with, impeding or delaying
31 the said construction of said island.

— — — — —
*Judge of the Supreme Court
of the District of Columbia.*

The foregoing request for finding of facts is denied as unnecessary, and the requested conclusions of law are also denied, on the ground that the conclusions of law deemed material are set out in the "Findings of Fact and Conclusions of law signed this day.

June 26, 1935.

JOSEPH W. COX,
Justice.

Final Decree.

Filed June 26, 1935.

* * * * *

This cause came on to be heard at this term, on the pleadings and evidence, and the court having made and filed its findings of fact and conclusions of law, it is now, this 26th day of June, 1935,

Ordered, adjudged and decreed that the bill of complaint be, and the same is, hereby dismissed with costs to defendant.

JOSEPH W. COX,
Justice.

From the foregoing decree, the plaintiff in open court notes an appeal to the United States Court of Appeals for the District of Columbia, and said appeal is hereby allowed; the bond for costs on said appeal is fixed in the sum of One Hundred Dollars (\$100.00), with leave to plaintiff to deposit the sum of Fifty Dollars (\$50.00) in cash in lieu thereof.

JOSEPH W. COX,
Justice.

32

Memoranda.

July 12, 1935.—\$50 deposited in lieu of bond on appeal. Order extending time to file statement of evidence to August 1, 1935, filed.

July 15, 1935.—Statement of Evidence filed.

Assignment of Errors.

Filed August 19, 1935.

* * * * *

Now comes the said Miami Beach Jockey Club, Inc., plaintiff and appellant in the above entitled cause, and

files the following Assignment of Errors upon which it will rely in the prosecution of the appeal, herewith petitioned for in said cause, from the judgment or decree of this court entered on the 26th day of June, 1935, viz:

1. The Court erred in admitting evidence and in making a finding of fact as to the use to which plaintiff intended to put the island it proposed to construct.

2. The Court erred in admitting evidence and in making a finding that prior to 1895, by Hawk Channel, an inside 12-foot channel, traffic passed in sailing boats from the mouth of the Miami River in Biscayne Bay—about four miles south at the side of the proposed island—to Key West, and was there transferred to steamers and went north.

3. The Court erred in admitting evidence and in making a finding as to commerce on the Intracoastal Waterway or Florida East Coast Canal, an artificial waterway.

33 4. The Court erred in admitting evidence and in making a finding as to the construction of the Intracoastal Waterway from Boston, Massachusetts, to the Rio Grande.

5. The Court erred in admitting evidence and in making a finding as to the site of the proposed island being suitable as an area which could be used as a taking off and landing place for hydroplanes and amphibian planes.

6. The Court erred in making a conclusion of law that Biscayne Bay is a navigable body of water subject to the control of the United States in the interest of navigation, and in its natural state susceptible of navigation and of use as a highway for commerce between the States, and has been and is now being so used.

7. The Court erred in making a conclusion of law that the permit issued to LeGro Properties, Inc., for the construction of an island was a revocable permit, conferred no vested rights as against the United States, and was subject to revocation by the Secretary of War.

8. The Court erred in making a conclusion of law that the action of the Secretary of War in revoking the permit was in the exercise of power and authority vested in him by the Congress, and was in the exercise of judgment and discretion lawfully conferred and was not arbitrary or capricious.

9. The Court erred in granting and entering judgment that the bill of complaint be and that it thereby was dismissed with costs to plaintiff.

10. The Court erred in refusing upon request therefor in behalf of plaintiff to find as facts the facts which it had been stipulated between plaintiff and defendant are the facts herein.

34 The Court erred in refusing to find the conclusions of law requested by plaintiff, to wit:

(1) That the island site is not navigable waters of the United States;

(2) That the waters covering the island site are not navigable in law, and are not navigable waters of the United States, and neither the United States nor the Secretary of War has any jurisdiction over the same;

(3) That the attempt of the Secretary of War to prevent the filling in of the proposed island has no real or substantial relation to the control of navigation or appropriateness to that end; and is an arbitrary attempt to destroy plaintiff's rights as the owner of the submerged or swamp lands, which constitute the island site, constructing which island does not involve the filling in the Intracoastal Waterway or canal;

(4) That the filling in of said island is not prohibited by § 10 of 30 United States Statutes, 1151, the sole authority said Secretary has to prohibit such filling, and he is without such authority;

(5) That said island, filled in, would not create any obstruction to the navigable capacity of the Intracoastal Waterway, and cannot, therefore, be prohibited;

(6) That the filling in of said island would not cause unreasonable obstruction to the free navigation of said Intracoastal Waterway, the sole ground for revocation reserved in said Permit, and said Secretary had no ground or right to revoke the permit to fill the same in;

(7) That, through the granting of said permit, and by plaintiff's making large expenditures and devoting much time and effort to the construction of said island, plaintiff acquired vested rights to construct said island, and that thereby said Secretary is and the United States are estopped from interfering with filling the same in;

35 (8) That the judgment and discretion of said Secretary were completely exercised in his determining July 1, 1931, that said proposed island would not destroy or seriously interfere with navigation, and it was beyond his power to review or to recall the same;

(9) That the threatened interference of said Secretary with plaintiff's rights, as owner of said site, to construct said island has inflicted, is inflicting and will continue to inflict irreparable injury on plaintiff, and that plaintiff has no adequate remedy at law for such loss or injury; and

(10) That plaintiff is entitled to and is granted a permanent injunction restraining said Secretary from interfering with said construction of said island.

Dated this 26th day of July, 1935.

S. WALLACE DEMPSEY,
Attorney for Plaintiff.

SIR:

You will please take notice of an Assignment of Errors this day filed in the office of the Clerk of the Supreme Court of the District of Columbia, a copy of which is hereby served upon you, and of which you will please take notice.

Dated this 26th Day of July, 1935.

S. WALLACE DEMPSEY,
Attorney for Plaintiff.

To Honorable Leslie C. Garnett,
United States Attorney.

Memorandum.

August 23, 1935.—Statement of Evidence submitted.

36 Supreme Court of the District of Columbia.

Wednesday, October 2, 1935.

The Court resumes its sessions pursuant to adjournments, the Justices sitting in Equity, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon the plaintiff by its attorney presents to the Court its Statement of Evidence taken at the trial of this cause and heretofore submitted herein on August 23, 1935, and prays that the same be signed and

made of record, nunc pro tunc, which is hereby accordingly done.

JOSEPH W. COX,
Justice.

Designation of Record on Behalf of Appellant.

Filed July 24, 1935

* * * * *

The plaintiff having perfected an appeal herein to the Court of Appeals of the District of Columbia on the 15th day of July, 1935, hereby requests the Clerk of the Supreme Court of the District of Columbia to prepare, at plaintiff's expense, a Transcript of Record on appeal, including therein the following papers and proceedings, namely:

1. Bill of Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.
4. Plaintiff's request for findings.
5. Final Decree.
6. Notation of Appeal.
7. Notation that \$50 cash was deposited as security for costs.
8. Statement of Evidence.
9. Assignment of Errors.

Map of Miami Harbor and Approaches, Defts' Ex. "B" is too large to include in record. One will be filed in Appellate Court, and more if desired.

Together with a copy of this designation.

37 Dated this 23rd day of July, 1935.

S. WALLACE DEMPSEY,
Attorney for Plaintiff.

SIR:

You will please take notice of the foregoing order and designation for preparation of record, and that it contains a list of all the papers and material which plaintiff deems material for the determination of the questions to be presented on the appeal.

Dated this 23rd day of July, 1935.

S. WALLACE DEMPSEY,
Attorney for Plaintiff.

To Honorable Leslie C. Garnett,
United States Attorney.

Designation of Record on Behalf of Appellee.

Filed August 9, 1935.

* * * * *

Now comes George H. Dern, Secretary of War of the United States, appellee in the above-entitled cause, and designates parts of the record to be included in the transcript in addition to those designated by appellant, such additional parts being deemed necessary and material for a determination of the questions raised on appeal, namely:

1. Order substituting George H. Dern, Secretary of War, party defendant in place of Patrick J. Hurley.
2. Order dismissing bill as to defendant Lytle Brown.
3. Defendant's Exhibits "A" and "D."
4. This designation.

LESLIE C. GARNETT,

United States Attorney;

H. L. UNDERWOOD,

*Assistant United States Attorney,**Attorneys for Appellee.*

38 Service of copy of the above designation acknowledged this 9th day of August, 1935.

S. WALLACE DEMPSEY,

Attorney for Appellant.

39 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 38, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 53979 in Equity, wherein The Miami Beach Jockey Club, Inc., is plaintiff and Patrick Jay Hurley, as Secretary of War of the United States, et al., are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of October, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,
By CHAS. B. COFLIN,
Assistant Clerk.

40 Submitted August 23, 1935. Jesse C. Adkins,
Justice.

In the Supreme Court of the District of Columbia,
Holding an Equity Court.

Equity No. 53979.

THE MIAMI BEACH JOCKEY CLUB, INC., Plaintiff,

v.

PATRICK J. HURLEY, Secretary of War of the United States,
and LYTLE BROWN, Chief of Engineers of the United
States Army, Defendants.

Statement of the Evidence.

The above-entitled cause came on for trial before Associate Justice Joseph W. Cox, in Equity Division No. 2, at 10:35 o'clock A. M., October 31, 1934.

Appearances:

On behalf of the plaintiff: S. W. Dempsey.

On behalf of the defendants: Harry L. Underwood,
Assistant United States Attorney; Major Harry A.
Auer, C. E. Fix, Special Assistant- to the Attorney
General.

Mr. Dempsey: Now, may it please the Court, I will read the stipulation of facts.

It is stipulated between plaintiff and defendants herein that the following are the facts herein:

1. Plaintiff is a Florida corporation, having its principal office at Miami in said State.

2. Patrick J. Hurley was for some time previous to
41 the issuance of the permit hereinbelow described, and thereafter until the 4th of March, 1933, Secretary of War of the United States, and acting as such, and George H. Dern, has, since the 4th of March, been Secretary of War, and acting as such.

3. Lytle Brown, during the times hereinafter mentioned was and still is the Chief of Engineers of the United States Army, and acting as such.

4. Heretofore, and prior to the issuance of the permit herein mentioned, deeds were made and executed (1) by the Trustees of the Internal Improvement Fund of Florida to the LeGro Properties, Inc. (a Florida corporation), of the submerged lands involved herein; (2) by the latter of the same lands to the Municipal Land Company (also a Florida corporation), and (3) by the Municipal Land Company of the same lands to plaintiff. There were two of said deeds to plaintiff, both dated June 26, 1931, and acknowledged and recorded the same day in the office of the Clerk of the Circuit Court for Dade County, Florida, the proper place for recording the same, both in Book 1445 of Deeds, one on page 393 and the other on page 396, photostat copies of which deeds shall be offered in evidence by the plaintiff.

Mr. Dempsey: There are two deeds, one of small piece and the other of 189 acres—about 195 acres altogether.

(Two deeds, from Municipal Land Company to the Miami Beach Jockey Club, Inc., dated June 26, 1931, and acknowledged and recorded on the same day in the office of the Clerk of the Circuit Court for Dade County, Florida, in Book 1445 of Deeds, one on page 393, and the other on page 396, were thereupon received in evidence, marked "Plaintiff's Exhibits 1 and 2.")

The other deeds described above by the Trustees of said Internal Improvement Fund, and by said LeGro Properties, Inc., were in the same form as said deeds to
42 plaintiff, and were recorded in the same office.

5. Previous to plaintiff's receiving the said deeds, LeGro Properties, Inc., a Florida corporation, made application to the Secretary of War for a permit to bulkhead and fill in said lands, which application was granted on July 1, 1931.

6. August 5, 1931, the Indian Creek Club filed a petition with said Secretary of War for a public hearing on the question whether said permit should not be revoked. Said Secretary granted such hearing, which was held September 4th and 5th, 1931. The petitioner's testimony was in part to the following effect:

That there will be a deficit of 1,000,000 cubic yards to fill in the island from the area to be dredged.

The island would be an obstruction in decreasing the navigable water area 5 per cent—from 19,000,000 to 18,070,000 square yards.

It would cause currents that would be objectionable from a navigational standpoint.

The owner's grant from the State of Florida is voidable in the opinion of a witness.

Certain residents of the vicinity are inclined to pleasure on the water, own some pleasure boats and the number of them and of the fishing boats will increase.

Currents caused by the island would stir up loose material on the bottom, but this would be avoided by constructing the island and depositing it behind the bulkhead.

The local traffic of small commercial and fishing vessels should increase as well as that of pleasure yachts, motor boats, sail boats, canoes and rowboats, which is of particular importance.

The landing of hydroplanes and amphibian planes would be interfered with.

The proposed use of the island would increase the vehicular traffic and cause some delay to water traffic.

Many prominent visitors come to Miami, enormous
43 sums have been invested in land, hotels, clubs and other improvements near and around the shores of the Bay, which interests must be considered and not sacrificed, and the island would interfere with sail boat races or small boat regattas.

October 2, 1931, said Secretary attempted to revoke, and issued a paper purporting to revoke said permit.

7. The northern part of Biscayne Bay could be reached by water only in one of two ways, (1) from the north through the Florida East Coast Canal; or (2) from the south through Biscayne Bay from the ocean.

(a) The northern part of Biscayne Bay is 375 miles from the nearest adjacent State:

“The tonnage (of the Florida East Coast Canal) for the year 1931 amounted to 63,788 short tons * * *. About 33 per cent of the total commerce consisted of rock and was carried on barges towed by motor boats drawing from 2 to 4 feet for distances not exceeding 30 miles. The balance of the commerce used portions of the waterway for distances from 10 to 25 miles and was carried in motor boats and on barges towed by motor boats drawing from 2 to 4½ feet.”

“The freight traffic to be anticipated on a canal down the east coast of Florida will be local traffic in the distribution of general materials and supplies from the seaports, and the collection of agricultural and other products at the shipping points. For this traffic a canal of adequate dimensions should form a valuable feeder not only for Jacksonville, but also for Miami Harbor and St. Lucie Inlet when these two harbors are improved as contemplated by projects now in force. No through traffic between Jacksonville and St. Lucie Inlet, Miami, or Key West is probable as the ocean route to these ports is not dangerous and much better time can be made on the open sea.”

44 “* * * ultimately such a waterway would be required to afford cheap and rapid transportation for the fruits and vegetables raised so abundantly along the route to the nearest deep seaport, the St. Johns River at and below Jacksonville.”

“The development of an inland waterway will be of immediate benefit to owners of lands along the canal in that it will facilitate shipment of their products to the several deep water ports now being developed on the line of the canal at such points as Miami, Fort Lauderdale, Palm Beach and Fort Pierce.”

“Ports for ocean-going vessels are being developed at Fort Pierce, Palm Beach and Fort Lauderdale. An inlet district has been formed for the development of a similar port at St. Lucie Inlet (Stuart, Florida). Miami already

has ocean-going connections. There can be no doubt that were the canal available a considerable traffic would develop thereon between the several cities named and the smaller communities situated on the canal to the north and south of the several ports named."

"Consideration must be given to the accommodation of craft built and operated solely for pleasure. A waterway along the east coast of Florida will be used very largely as an inside route for pleasure craft proceeding to the winter resorts of Florida. Although this traffic will involve very little freight or passenger transportation, and therefore may not be used as a legitimate argument for the appropriation of Federal funds under cover of the Interstate Commerce Clause of the Constitution, it is a very reasonable justification for expenditure of funds provided by the local communities which derive great profit from the expenditures made by owners and guests traveling on pleasure craft. Assuming that a large portion of the traffic on this intracoastal waterway will consist of pleasure
45 craft, it appears logical to require a large measure of local cooperation in providing a waterway which will accommodate pleasure craft that can not safely and conveniently reach the coast cities by the open route—and this aside from the local benefits derived from improved freight facilities."

"If commerce should sufficiently develop in the future to justify the expense of a number of these harbors, and if there were provided, it would not decrease the usefulness of the intracoastal waterway. Through shipments between Jacksonville and Miami might decrease but the intracoastal waterway would then be used extensively for local distribution of the greatly increased amount of freight to and from each completed deep-water harbor."

"In regard to point (c), a comparison has been made between the total amount of citrus fruit shipped out of Florida during the season ending July 30, 1925 (information furnished by the Florida State Marketing Bureau), and the amount shipped by water during the calendar year 1925. This comparison shows that about 7 per cent was shipped by water, and that more than half of this amount was either consumed in Florida or reshipped by rail before leaving the State."

“The saving assumed for Dade County” (which extends about 40 miles north of Miami) “is the same as that used by the east coast chambers of commerce on the assumption that outgoing fruits and vegetables will move south to Miami and be reshipped either by rail or coastwise vessels from there.”

8. The water where the island would be is one and one-half miles wide, and varies in that part of the bay from two to six feet in depth. The island would adjoin on the north the northernmost of the three causeways across the Bay, known as the 79th Street Causeway, which has two
46 openings, one near the westerly end and the other near the easterly end, so that the only navigation to and from the northern part of the bay is through these two openings. The principal channel passes through the west opening. The island would be 300 feet from this channel and 3000 feet from the east causeway opening.

9. In the development of Miami various areas in and adjacent to Biscayne Bay have been reclaimed by filling.

10. The conditions as to the effect of the construction of plaintiff's said island upon navigation were the same at the time that said Secretary of War attempted to revoke said permit that they were when he granted the same.

11. Said Secretary of War and said Chief of Engineers, by said attempted revocation of said permit, have asserted and still assert thereby a claim to the right to prohibit the filling in of said island.

12. That the dredging for material to fill in said island will remove silt, mud and other material from a large area of the adjacent parts of the bay, giving an increased depth.

13. A map of the entire *locus quo* shall be available showing all of the details of the waters in question, to be approved by both parties. United States Coast and Geodetic Survey 583, published September, 1927, shows conditions prior to the construction of the causeway and adjacent improvements in northern part of Biscayne Bay, and *idem*, published March 1931, shows conditions as of that date.

14. That either party may present further testimony upon the trial with respect to any of the issues involved in the case.

15. That either party shall be entitled to object to the competency, materiality, or relevancy of any of the matters

set forth in this stipulation, as evidence in the case, no objection being made as to the form of such proof.

47 16. The first project on the Intracoastal Waterway from Jacksonville, Florida, to Miami, Florida, adopted by an Act of Congress approved June 15, 1844 (5 Sta. 670), provides for connecting Indian River with Mosquito Lagoon.

A project for dredging a channel through Negro Cut to Indian River Inlet was adopted by the River and Harbor Act of August 18, 1894 (28 Stat. 351), and in the Act of February 26, 1896 (29 Stat. 21), provision was made for opening Jupiter Inlet for the passage of boats and small vessels.

A five-foot project for Indian River, Florida, was adopted by the River and Harbor Act of July 13, 1892 (27 Stat. 101).

The existing project adopted by the River and Harbor Act approved January 21, 1927 (44 Stat. 1012), (H. Doc. 586, 69th Cong. 2d Session), and the Act of July 3, 1930 (46 Stat. 924), provides for an inland waterway in general 100 feet wide and 8 feet deep at mean low water from Jacksonville to Miami.

Mr. Dempsey: I offer that in evidence.

Mr. Underwood: This stipulation was as of June 29, 1933. As to paragraph 6, there was a reservation in paragraph 15 of the right to object to the competency, relevancy or materiality of the matters therein.

The Court: That is a synopsis of the testimony by the engineers?

Mr. Underwood: Yes, I have no objection to the statement that such testimony was produced, but I object to its relevancy, competency and materiality as tending to submit to the Court any question as to whether this island would not be an obstruction to navigation, for the reason that that question is committed to the Secretary of War in the exercise of his judgment, and that that judgment was exercised upon a record not here. There was testimony taken, and there is no allegation that there was not substantial evidence upon which the Secretary could act. The question whether there was sufficient to warrant his action in

48 revoking the permit is one solely for the Secretary of War, and that your Honor cannot determine that it was arbitrary, unless you have all that was before the Secretary of War.

The Court: I cannot go into that, unless there is evidence showing there was nothing before him.

Mr. Underwood: The record down there is not before you. This is a stipulation that the petitioner's evidence was, in part, to this effect. The basis of this case is that there was a want of power in the Secretary to revoke; that granting it was an exhaustion of his power. So there is no allegation that there was not sufficient on which to predicate the Secretary's findings. I object to paragraph 6, in so far as it is attempted thereby to submit to the Court the question whether this revocation was justified.

The Court: Well, the effect of that I am not considering now. The stipulation is that at that hearing there was testimony of this kind?

Mr. Underwood: Yes. We do not agree that that question is for the Court.

The Court: You admit that the facts were there?

Mr. Underwood: We admit that that was a portion of the testimony at the hearing.

(Stipulation, entered into on June 29, 1933, was thereupon marked "Plaintiff's Exhibit 2a", and was received in evidence.)

Mr. Underwood: I offer a copy, certified by the Secretary of War, of the papers in connection with the application of LeGro Properties for a permit for the construction of an island in the locality here involved.

(Photostatic copy, certified by the Secretary of War, of papers described as the application, the permit for the construction of the island, and the revocation of such permit, were thereupon marked "Defendants' Exhibit A",
49 and were received in evidence.)

Mr. Dempsey: The application for this permit was made in April, 1931. A report was made on the application, and that showed that the necessary State authority had been obtained for the filling in of these submerged lands.

The report of the District Engineer says:

(a) Navigation, present or prospective, with the reasons: As indicated upon the permit drawings, the proposed island will not interfere with the new alignment of the intracoastal waterway channel in this section of the bay. The proposed dredging will afford deeper and will probably result in the

tidal currents flowing more freely in this section of the bay, and it is thought it will tend to reduce the maintenance work of the above waterway in this vicinity. The proposed construction will not interfere with present or prospective commerce.

Under Section 8, remark:

On September 11, 1925, the Division Engineer issued a permit to the North Venetian Islands Company, F. C. L. LeGro, Vice President, Miami, Florida, authorizing it to construct bulkheads and to dredge, the dredged material to be deposited behind the bulkheads, forming four islands in Biscayne Bay at Miami, Florida. In accordance with conditions (1) of above permit, the authority granted thereby expired on the 31st day of December, 1928. An application for extension of the time for the completion of this work was submitted by Mr. LeGro, but as this application was received after the date of expiration, and as Mr. LeGro did not have the authority of the North Venetian Islands Company to submit the application for extension, the Chief of Engineers declined to extend the time limit, but stated that whenever further operations are intended a new application for a permit should be made. This present application was submitted accordingly. The islands
50 in this portion of the bay, as authorized by the above permit to the North Venetian Islands Company, are shown upon the drawing, Sheet No. 5 accompanying this present application, together with the island and dredging area for which a permit is now requested. It is believed that the island now desired will not be more objectionable than those previously authorized.

Mr. Dempsey: I call attention to the concurrence in Defendants' Exhibit A of Mark Brooke, the Division Engineer, and of General Pillsbury, Acting Chief of Engineers, dated respectively June 13, 1931, and June 23, 1931.

That permit is issued under that Section 10.

I also read the memorandum made by General Lytle Brown, Chief of Engineers, in attempting to revoke the permit, dated October 1, 1931, which reads:

Subject: Protest against construction of an island in Biscayne Bay near 79th Street Causeway, Miami, Florida.
To: The Secretary of War.

1. Under date of July 1, 1931, the Division Engineer, Gulf of Mexico Division, with the approval and authorization of this office, issued to the LeGro Properties, Inc., a permit to construct bulkheads, to dredge and fill, developing an island in Biscayne Bay, Miami, Florida, north of the middle section of the 79th Street Causeway.

2. About one month after the issuance of the permit numerous protests against the project were received. On August 5, the Indian Creek Golf Club petitioned for a hearing on the matter, that it might submit evidence as to the advisability of revoking the permit on the grounds that the project would constitute an unreasonable obstruction to the navigable capacity of Biscayne Bay north of the 79th Street Causeway.

3. A public hearing was held at Miami, Florida, on September 4 and 5, at which time all parties at interest
51 were afforded an opportunity to present evidence bearing on the premises.

4. I have reviewed the hearings on the protest and have examined the proposed project. I am impressed by the following conclusion:

(1) Biscayne Bay is not primarily a commercial port but a winter playground where a very large investment has been made in winter homes.

(2) The upper end of Biscayne Bay has been improved around its borders for home purposes and the adjuncts of these homes.

(3) The proposed island occupies space that is now available for navigation by pleasure boats, which navigation is that which is most suitable to the locality.

(4) The adjacent property owners are, as a rule, opposed to the building of the island, and reasonably so, both from a navigation standpoint and from a standpoint of injury to their property, for this reason and for the reason that the race track would injure the investment made by them.

(5) It appears to be an extravagant scheme to build a race track at such expense when there are other places where a track can be built more economically and still serve the purpose without injury to private property of great value, and further be more accessible to the public.

5. From the conclusions above given I believe that this permit would not have been granted in the first instance had all conditions surrounding it been known.

6. In view of the foregoing and other facts brought out at the hearing on September 4 and 5, 1931, I am of the opinion that the proposed work will constitute an unreasonable obstruction to navigation. I am therefore obliged to recommend that the permit issued by local engineer authority be revoked. Your approval or disapproval of this recommendation may be indicated below.

52

LYTLE BROWN,
Major General, Chief of Engineers.

Approved.

F. H. PAYNE,
Acting Secretary of War.

We offer in evidence this map, issued June 15, 1934.

(Map referred to as map issued June 15, 1934, was thereupon marked "Plaintiff's Exhibit 3," and the same was received in evidence.)

Mr. Dempsey: I offer in evidence parts of the report of the Secretary of War to Congress, being document No. 1147, of the 65th Congress, 2d Session.

Mr. Underwood: I suggest that he put the whole thing in and then refer to it.

Mr. Dempsey: All right.

(Document No. 1147, 65th Congress, 2nd Session, was thereupon marked "Plaintiff's Exhibit 4", and the same was received in evidence.)

Mr. Dempsey: I refer to paragraph numbered 4, on page 7:

"The East Coast Canal is a continuous waterway, partly natural and partly artificial, from the St. Johns River to Biscayne Bay. It embraces the chain of shallow salt-water lagoons and creeks inside the beach ridge and a series of artificial cuts connecting these natural waterways. In addition to the cuts through marsh and high ground much dredging has been done in the natural waterways where the original depth was insufficient. The entire length of the route from the St. Johns River to Miami, on Biscayne

Bay, is about 380 miles.” (Doc. 1147, 65 Cong., 2d Sess., Plff’s Ex. 4.)

Then, from paragraph numbered 8, on page 8. That was
after the incorporation of this corporation that un-
53 dertook the construction of this canal.

“The original requirements as to depth and width of the canal were indefinite, the only provision being that the channel should be of sufficient depth to afford navigation for vessels drawing $3\frac{1}{2}$ feet.” (2d.)

We call Mr. Smoot.

Whereupon **Joseph M. Smoot** was called as a witness for plaintiff, duly sworn, and testified as follows:

Direct examination.

By Mr. Dempsey:

I have lived in Miami since 1923. I am President of the plaintiff corporation and have been since its incorporation. I remember obtaining the permit to fill in this island.

In acquiring title to these swamp or submerged lands, the 200 acres, we assumed a \$95,000 mortgage. We agreed to pay it.

Mr. Dempsey: We offer in evidence a statement of plaintiff’s expenses.

(Statement of plaintiff’s expenses was thereupon marked “Plaintiff’s Exhibit 5”, for identification.)

All of the expenditures shown by Plaintiff’s Exhibit 5 were necessarily made by the plaintiff in and about the preparations for the construction of this island. The date of the first expenditure shown is July 17, 1930. I know that of my own knowledge. I checked those through myself and know what all the various items are. I was president of the company. These expenditures were in the aggregate, in cash, \$59,135.46, and, besides that, mortgages were assumed to the amount of \$94,970, a first mortgage of \$18,994 and a second mortgage of \$65,186.08.

When I formed this company and negotiated for the purchase of this submerged or swamp land, I knew that

54 there had been a permit outstanding several years, for the filling in of these lands, which had expired solely by the passage of time.

I asked Major Brown early in 1930, the local engineer, about this previous permit, and was assured by him that in his own opinion there would be no trouble in obtaining a permit for the same tract of land. This was before I formed the company, and concluded my negotiations for the purchase of this land. I was told to confine the size of the piece of land as near as possible to the former permit, which we did. I knew, also, previous to consummating the purchase of these lands, that an application for a permit had been made and had been endorsed favorably by the District Engineer. The plaintiff made its expenditures on the faith of my knowledge of these facts.

I did not receive any compensation myself. I devoted to this matter all of 1930, and until the election in 1931, and three months after that in trying to have the permit reestablished—two years.

I built the other race track in Miami and operated it four years. The last salary received by me as a racing executive was \$75,000 a year. I was employed for that purpose by the Miami Jockey Club, as president. That was the last year I was with them. It was \$50,000 salary and bonus \$25,000. I received a salary four more years, averaging \$60,000 a year.

An election was held there October 21st, as to whether the municipality—Miami and Miami Beach—favored or was adverse to plaintiff operating a race track on this contemplated island. I carried the country three to one. The vote for it was approximately 22,000, and against it—on a ratio of three to one. The certified results were three for it and one against it. That was the only question that was presented—a special election held to determine whether or not the people of Miami Beach and Miami approved of my building this race track in the Bay of Biscayne, and on this particular property.

55 By the Court:

Q. It was just after the revocation of the permit? A. I was notified about the permit about the 14th or 15th.

By Mr. Dempsey:

There are five precincts in Miami Beach. We carried Miami Beach.

I have been in Miami recently. I crossed the 79th Street Causeway. The United States was excavating the channel in the harbor there. I observed where they were piling the dirt taken out of the channel.

Mr. Dempsey. I ask to have this marked for identification, please.

(A map entitled "Location Sketch; to Accompany Permit Application," marked Plaintiff's Exhibit No. 6, for identification.)

The Witness: Exhibit No. 6, identification, a map of the vicinity of this proposed island, was with the application. I have indicated, after seeing it, where the material excavated from the canal is piled, by lead pencil marks upon Exhibit 6. The dirt is piled at the side of this canal so that it comes above the surface of the water, so that it is land, now, where those lead pencil marks are, and not water. That varies in width and height at different points. I would say that the narrowest point would be close to 50 or 55 feet, and the widest 300 feet across.

They have carried that dumping of the debris from the canal, at the side of the canal north from the third causeway, the 79th Street Causeway, three-quarters of a mile or a mile—maybe further. This dirt varied in its height above the surface of the water. There are places where
56 you can just barely see it and there are places where it appears to be as much as four or five feet. I never measured it; that is from observation. I am testifying to all these measurements from eye observation, and not from measurements; just driving by and stopping long enough to look at it.

I drove first down the east side of Miami Beach, as near as I could get to it, down the street. That is the farthest side from the island, and the farthest side from the channel. At that particular spot it must be a mile and three-quarters from the channel. Then I turned and drove west over the 79th Street Causeway, which put me right adjoining the property where this fill starts, and I stopped there and looked right straight by it. The filling does not run

straight. It runs kind of northeast. It does not have the same width all the way through. It is like any other dump, where they have sucked the sand out. There is no attempt to make it uniform.

I was observing that at normal tide. I have a pretty fair idea of high and low tide. May be the tide was starting to go out. It was 5:30 in the afternoon. The tide had turned for an hour. It takes several hours for the tide to run completely.

This dirt or debris cuts the channel off from all communication by water with all that part of Biscayne Bay to the east of the debris. There are parts there where the dirt thrown in is somewhat below water. A row boat may be able to go over it, but I would not think that a boat that would draw two feet of water would go through it, because the dirt is higher in places, and comes down in other places, and goes up.

While there might be room for a row boat here, there is a width of from 55 to 100 feet, and while there might be enough water for a row boat, part of the 55 feet or part of the 100 feet, it might be stopped by dirt after it got part way in. There is no throwing of the dirt out to the west of the causeway. There may be some up in the north
57 portion of the map, on the west side of the channel of the canal. I think the filling extends as far as about on a line with the Indian Creek Golf Course. There were some yellow light spots in the water up there that I could see. That may be normal high bottom there. It extends up to about the northern extremity of this map.

The Court: I assume that land is valuable when it has once been built up there in the vicinity of that city.

The Witness: Yes.

The Court: I suppose it would take a great deal of work to dredge enough material out of the bay to build an island, and that a man would not do it unless it were going to have value, so I would naturally assume that there was value.

(Map entitled "Location Sketch; Sketch to Accompany Permit Application," heretofore marked Plaintiff's Exhibit No. 6, for identification, was received in evidence.)

By Mr. Dempsey:

This debris or material from the canal, or part of it, was dumped over on plaintiff's land; on the extreme northwest

portion of this particular island it appeared that there was a part of it covering this. Just how much I could not tell you.

By the Court:

Q. Was the northwest corner of your particular tract marked with anything? A. No. The only identification for the width of the land is my own remembrance of where it began on the east and ended on the west of the causeway, and about how high north, by a line across the bay, from objects on each side.

Mr. Underwood: I object to this line of testimony as intended to bring into issue whether this is an obstruction to navigation, and immaterial.

The Court: This testimony you have been objecting to I have been allowing subject to your objection.

58 Mr. Underwood: A further reason is because all this has happened since the revocation of the permit. Are you going to judge conditions at the time——

Mr. Dempsey: Right up to the end of the bill.

The Witness: I have lived in Miami since 1923. I have, from time to time, seen the ocean-going vessels that navigate the channel south of the south causeway in Biscayne Bay. The freight wharf and the wharf for the mooring of vessels there begins at the side of the old County Causeway, the last southern causeway and it is on the southern side of the southern causeway.

There is a causeway that parallels the main channel on the beach side, it is right adjoining the main channel, until it gets to the first turn, and then it leaves and goes, then, straight across the other end of the causeway. That is marked "Miami Causeway," but is known as the old County Causeway.

The triangle is the turning basin, and the wharves. The shallowest draft of vessel I have observed there in my ten years or more—ocean-going vessel navigating that channel—was 12 feet and from that up. There were not many ocean-going vessels as low as 12 feet. I think they are mostly tankers, small tankers of that draft. There are others, like the Clyde and the Mallory Line, which drew considerably more—possibly 16.

The Court: Do you all agree as to the depth of that channel?

Mr. Dempsey: It is shown here to be 25 feet. Thirty feet is approved.

The Witness: I observed these irregular islands to the south of the main channel—five of them—they are not inhabited or used. That was dirt taken from the channel and thrown over there.

They are artificial islands. It was made as a result of deepening this channel. They threw the material over there. The only thing on them is scrub pine trees
59 and growth of that kind.

Palm Island, Hybiscus Island, Star Island, the five Venetian Islands are artificial islands. Part of Normandy Beach is an artificial island. The outer edge has been filled out in there. There is a canal that runs across Normandy Beach and some part of the land south of the canal was above water before any filling in was done, but the part north of the canal is artificial. Two large islands north of Normandy Beach and Biscayne Point are artificial.

The Court: By the beach, you mean—the land across the east of Biscayne Bay?

Mr. Dempsey: The east side of the bay.

The Witness: The southern end of Miami Beach is the greatest portion of natural land that has not been filled on that beach. All the front of the beach on the east side of the beach, facing the ocean, was high land since 1915.

The east side of the beach, from the Venetian Causeway all the way up, was above water. The greater part of the west side, from the Venetian Causeway, has been filled in.

A third of the entire site of the island, as shown on this map, has been bulkheaded and filled in. It was a swamp before. The part south of the Venetian Islands Causeway was all above water. The land under water was north of the Venetian Causeway and west of Indian Creek. At Sunset Island there are four islands. They have been filled in.

Cross-examination.

By Mr. Underwood:

The Miami Beach Jockey Club was incorporated about July 1, 1931. A real estate corporation known as the LeGro Properties, Inc., was interested in the development of this particular piece of land, prior to my becoming interested in it. The Municipal Land Company was
60 incorporated to acquire this land the latter part of 1930. I was president and a stockholder. Its capitalization was 100 shares of common stock of no par value.

I was the president of both the Jockey Club and the Municipal Land Company. I owned all the stock of the Municipal Land Company. I first became interested in this particular property in January and February, 1930, before the incorporation of either the Municipal Land Company or the Miami Beach Company. At that time the entire interest was personal. I cannot give the date I took title from the Municipal Land Company. The deed should show it. The Municipal Land Company took title first from LeGro, and the Miami Beach Jockey Club took title from the Municipal Land Company.

When this deed from the Municipal was taken by the Miami Beach Jockey Club, I held all the stock of the Municipal, and a majority of the stock of the Miami Beach Company.

My first negotiations with the LeGro Properties about this tract in controversy was January and February, 1930. I had no agreement with the LeGro Properties that they would apply for this permit. Then I was trying to find a piece of submerged land in Biscayne Bay for building a reace track. I did not ask or suggest to the LeGro Properties that an application be made for this permit. I asked LeGro what had to be done to fill it, if the application was granted by the State. I did not know that you had to have a Government permit. I thought it was a State matter. I first discovered it was necessary to have it in February. LeGro told me that a permit had been issued in February, 1930, on this particular piece of land, by the Government, and that he was assured that there would be no difficulty in the permit being reissued. I had no understanding with LeGro then that I would take title to this

island; only asked him what difficulties I would possibly encounter—I thought from the State. In February, 1930, I learned that the former permit had expired. I took up the securing some property with LeGro or somebody else in January, 1930.

61 I then attempted to locate submerged land in Biscayne Bay to purchase it to build a race track on it. The land was located. Then I discussed it with LeGro. He said that his land, acquired from the State, would be large enough. He showed me where it was located. After a month or two I said to LeGro, "Just what is necessary in order to fill in these islands? From whom do you have to get a permit?" He said, "From the Government". I said, "Is there any difficulty in getting the permit?" He said, "No; I have had a permit on this piece of land, but it has expired, and I am assured that another permit will be issued if the conditions are not changed"; and they were not changed—I mean the length and breadth of the piece of land.

The size of the tract he had the permit on was the same as the tract here. If anything, our tract was smaller. He represented to me that the piece of land he could deliver to me was the same piece on which he had had a permit, which had expired.

These were all under-water lots that I was trying to secure. It took several months to get all the details and in that time I was at considerable expense, but not the expenses I have testified to. All the preliminary expenses in looking into this piece of land and trying to acquire it were paid by me personally.

A new application to cover this tract had been discussed the latter part of 1930, but it was not determined on, nor was it published—I think they published it 30 days, and it was posted in public buildings for 30 days. That was in May, 1931.

I appreciated that this island could not be built unless I had the consent of the Secretary of War and a permit from him, but had the assurance that this permit would be issued from your local engineer. I appreciate that the Secretary would not be bound by what a subordinate said, and did then, but I assumed that if he had issued a permit on the same piece of land, and there were no changes, in all probability he would issue one again.

62 LeGro Properties applied because then the two corporations had not been completed, and LeGro had had experience in acquiring the previous permit, knew what had to be done, and my instructions to him were to go ahead and obtain the permit. LeGro was the developer of these islands for residential purposes. An attempt was not made by racing interests to acquire the permit under a subterfuge. There was no mention in the application or in the advertisement in the papers of any interest of the Miami Beach Jockey Club in this project. Everybody locally knew it.

The first thought of the Municipal Land Company was that it would be more profitable not to build a race track, but to subdivide it and sell it. That was one of the objects of the Municipal Land Company.

By Mr. Underwood.

Q. In any event, there was nothing said to any of the representatives of the War Department. A. Major Brown knew it, at the very beginning. I told him in February, 1930, before the land was even purchased, that I was trying to acquire this piece of property, and I said, "Major, if I can get title * * *, and * * * a permit to fill it in, I am going to build the most beautiful race track in America on it." It was not necessary to say anything about this in the application. Surely the War Department was not interested in whether it was racing or chicken fighting, or what was going to go on.

I was not apprised of the revocation of the permit until 6 or 7 days before the election, which was the 21st of October, 1931. I was not an applicant, nor was my company; but I had asked to be notified.

I knew a hearing had been held August 4 and 5, 1931, and that September 11, 1931, LeGro Properties were notified that the work authorized under the permit was temporarily suspended. We were not doing any work on the island.

I knew it on September 11; but only that there had
63 been no decision and that it was advised that no work be done until the decision was rendered.

The LeGro Properties were informed of the revocation of the permit about the same time that I was. It was common knowledge at this hearing that the Miami Beach Jockey

Club had acquired the title to that property. Otherwise there would have been no opposition.

I can tell you what these different items of expense are for, of my own personal knowledge. I O.k.'d the payment of them. If this memorandum is offered in evidence, it shows what they were. I have testified, as these things were read off to me, that these expenditures have been made.

On June 24, 1930, the Miami Beach Jockey Club was not in existence. A part of the expenses were incurred before the Miami Beach Jockey Club ever had existence; all for the acquisition of title were assumed before the permit issued. We purchased five days before the permit was issued. The hearing had been held, though, without any opposition to it prior to that—the public hearing, as to whether there would be any opposition to granting this permit.

The district engineer published in the newspapers and in public places that a permit had been asked for, and, if there were any objectors, that they should go on record before the permit was issued. That is what I mean by a hearing, not one where the protestants come in and are examined.

I was advised that the property that I acquired was smaller than that upon which the permit had formerly been issued.

I proposed to erect on this island a complete racing plant, consisting of a grand stand, accommodating 15,000 people, 70 feet high; a club house, accommodating 2,500 people; on the north end of the island concrete, not frame, stables; an
64 administration building; a paddock where the horses
are kept just before the race; and a superintendent's home, of a small bungalow type. None of these buildings exceed, but all would be less in height than the grand stand. There would be no objection from the standpoint of a building permit. No work has been done on the construction of this island.

I cannot give you exactly what part of plaintiff's total expenses were made between July 1, 1931, the date of the issuance of the permit, and September 11, 1931, the date on which notice went to LeGro from the War Department of the temporary suspension of the work—but I would say fully two-thirds of it.

There has been no construction work done; we have not let any contract for it.

If I filled in the island and conducted a race track there, I did not have a ferry to get the people there. It was not necessary. I proposed to get them there by the 79th Street Causeway. That was plenty wide enough.

I do not know whether when the under-water lands of LeGro were deeded to the Municipal Land Company on June 26, 1931, and on the same day by the latter to the Miami Beach Jockey Club, Jockey Club notified the Secretary of War of the transfers. I cannot see the object of doing it. No permit to erect such an island on the properties of LeGro was ever granted by the Secretary of War to the Miami Beach Jockey Club. It was made to either the Municipal Land Company or LeGro Properties. There was only one permit granted—that embraced in Defendants' Exhibit A.

Since the revocation of the permit in October, 1931, I know of no further action that the War Department has taken, or contemplated against the Miami Beach Jockey Club. Neither I nor our company has ever been threatened by any officials of the War Department as to any further action in this matter. I would know if they had.

There has been no physical interference and no threat of it.

65 The Court: Does not that really show the immateriality of all this? The United States says, "We have jurisdiction over this water. We have revoked the permit that was given to build an island here." Does it not follow from that that the United States would not allow this island to be built without a permit?

Mr. Underwood: Quite right; but I just wanted to get away from any impression that might be created by this record that there was interference, and actual threatening.

The Court: They have not sent the soldiers yet.

Mr. Underwood: There is nothing in the stipulation of facts. (Reading:)

"Said Secretary of War and said Chief of Engineers, by said attempted revocation of said permit, have asserted and still assert thereby a claim to the right to prohibit the filling in of said island."

The Court: There is no contention or allegation that they have actually interfered, otherwise than by the assertion of this paramount right. I assume that they would stop

it if they undertook to fill it in. I think that is a fair assumption.

Redirect examination.

By Mr. Dempsey:

We were notified that the permit had been recommended and would be granted, on June 10, 1931.

Mr. Underwood: I move to strike out the testimony of Smoot relating to accretions and the building up of islands in Biscayne Bay, on the ground that this has no relevancy or materiality on whether this bay is navigable. I also move to strike out Smoot's testimony as to expenditures, on the ground that these expenditures, in large measure—and I am directing my motion to those—were prior to the issuance of the permit, and a large part of claimed expense to the Miami Beach Jockey Club was prior to its incorporation, and could not have been chargeable to the Club;
66 also the expenses of incorporation and of corporate maintenance as not elements to be charged as expense with relation to this permit, or admissible under the issues here; and legal expenses, and the lump sum claimed, because there — no break-down, and not shown to have relevancy to construction of the island.

The Court: I will reserve these matters until I hear the remainder of the case.

Mr. Dempsey: I offer in evidence the contract between the Government and the Arundel Corporation, for the dredging and deepening of the intercoastal canal, and I call attention to paragraph numbered 21, subsection (b), which I will read. (Reading:)

“(b) In the Biscayne Bay section, except for the extreme northerly and southerly portions, the excavated material shall be transported and deposited in the open waters of Biscayne Bay on the east or west side of the channel, as directed by the contracting office. The minimum distance between the base of the spoil bank and the adjacent edge of the dredged channel shall be not less than 1,000 feet, except at places where the proximity of the shore line or other cause renders inadvisable the deposit of material at a distance as great as 1,000 feet from the adjacent edge of the channel.”

The date of the contract is the 15th day of October, 1932, just about the time of this construction.

Mr. Underwood: I object to that as incompetent and irrelevant and has no materiality to the issue in the case. It relates to a contract for dredging entered into October 1, 1932, a little over a year after the revocation of the permit. It is too remote and has no bearing.

The Court: I admit it subject to your later motion to strike it out.

(Contract between United States and Arundel Corporation, October 15, 1932, was marked Plaintiff's Exhibit No. 7, for identification.)

By Mr. Dempsey:

67 The northwesterly portion of that island is 1,200 feet from the nearest part of the new channel of the intercoastal canal.

Mr. Underwood: I object to that.

Mr. Dempsey: The stipulation is 300 feet.

The Witness: I do not dispute the map. The map refreshes my recollection as to the distance.

The Court: I assume the contract was to be carried out.

Mr. Dempsey: And was carried out.

The Court: As is shown in the contract.

In these piles of excavated earth on the east side of the channel, north of the 79th Street Causeway, there were low places, some higher than others, I was able to see. There were no openings left in the piles as they were piled northeasterly and southwesterly there.

Recross-examination.

By Mr. Underwood:

There were no openings at all left in this dredged material, so that boats might go through. There was nothing at all of that kind, just low and high places. There is a continuous row of dirt along there. It was continuous and there was no opening in it anywhere where boats could get through, nothing like a cut.

By the Court:

It was above the surface of the water all the way through; some was low and some was high.

Mr. Dempsey: We rest.

Lawrence J. Carr called as a witness for defendant and duly sworn, testified as follows:

Direct examination.

By Mr. Underwood:

I am a lieutenant in the Army Air Corps. Since
68 March, 1932, I have been doing over-water work, navigation, mostly with amphibian air boats. I am familiar with them and their operation, but not with sea-planes or their operation—but they are similar.

I know Biscayne Bay; I have flown over it four times.

Q. Would this area of the proposed island be suitable for the taking off and landing of hydroplanes or amphibians?

Mr. Dempsey: I object to it as incompetent, irrelevant and immaterial.

The Court: I will overrule the objection.

Mr. Dempsey: I ask for a preliminary examination.

The Court: You may ask your questions.

By Mr. Dempsey:

There are in or adjacent to Miami, at the present time, one Government and three commercial plane bases, that I know of. The Government landing field is used very little.

I have never landed in Biscayne Bay north of the 79th Street Causeway. I have never seen anybody else land there. To my knowledge, it has never been used for that purpose.

Mr. Underwood: I object to all those questions—and move to strike out on the ground that they are cross-examination.

The Witness: That area north of the Miami Causeway is suitable and susceptible of use for the taking off and landing of hydroplanes and amphibians. The depths by the site of the island are five and six feet.

Mr. Dempsey: I ask that his answer be struck out on the ground that a large portion of that submerged land has been filled in above the surface.

The Court: Overrule the objection.

Mr. Dempsey: I except.

69 The Witness: The depth of water in which planes, seaplanes, or hydroplanes and amphibians can be safely landed depends on the size; the larger the boat the deeper the water. In this area, you can land an amphibian, a seaplane, up to a capacity of eight persons, with a mechanic and pilot. When you take off in an amphibian or a seaplane, the requirement so far as clear space on the surface, in length, depends on the wind and the load you have. The more you have, the easier it is, anything that is land or any obstruction at all.

An 8-passenger plane, in taking off, would need a mile and a quarter, free room on the water, to get you clear—under the worst conditions; under normal conditions, three-quarters of a mile to a mile; and half a mile under any condition. Coming in, the area needed depends on how high you have to come in. If you have nothing around it, you can land right on the edge. You don't need so much area. If you have to come in high to clear something, you need more area. You don't need as much to land as to take off.

I know there is a place for a landing field down there. I have seen it on the ground. That is a field, a base for seaplanes, amphibians, and these Government boats. It is a land-place primarily.

Mr. Underwood: That is Dinner Key.

Cross-examination.

By Mr. Dempsey:

We would have, north and south, if this island were filled in, a good deal over a mile. So you have three miles there north, even if the island were filled in.

East and west, if the island were constructed, you would have a thousand yards—between Normandie Beach and the proposed island.

The Pan-American Airways is private. It is used for all of the airplane service between Mexico, Central America,

South America, and the United States, and is equipped with agents for the Labor and Treasury Departments, 70 the Public Health Service, all the representatives of the Government having to do with commerce, passengers or freight, between those countries and this Government, are represented.

That airport is very much used. It is right on water. There is no landing field on the land there. The other airplane stations are a municipal and an old Pan-American airport.

You need laterally at the side of your machine to take off, theoretically, only the width of the aeroplane—a hundred feet. It varies with the different sizes from a hundred feet to sixty. A mile would be a safe distance laterally to take off. The further away the better. You could land safely in the ordinary river but you might not be able to get off safely. Starting requires more width than the ordinary river, up to a mile. The reverse is true in bad weather. Then you need more room for landing than normally. If you have bad weather you cannot have anything stick up at all; you cannot have too much room, especially something sticking up.

Redirect examination.

By Mr. Underwood:

The depth at Dinner Key is five and six feet. There is a dredged channel 8, 10, and 11 feet near the middle. That is used by planes of all sizes.

By Major Auer:

The distance east and west immediately north of the 79th Street Causeway between Normandie Beach and Miami available for landing or taking off with no island is a little less than a mile and a half.

Recross-examination.

By Mr. Dempsey:

Amphibian planes may land at the Pan-American Airway Station, but they use seaplanes entirely. I do not know of amphibian planes landing anywhere north of the 79th Street Causeway at any time. When we have landed

there, we have landed at Chapman Field. These fields and these bases are established for landing; anywhere in the United States where we have stations and fields
71 prepared for landing, we do not go and select any old place that might be a possibility, but we land at the stations.

Mr. Dempsey: I move, to strike out all the testimony of the last witness as irrelevant, immaterial and incompetent.

The Court: I reserve the ruling.

Whereupon **Malcolm Elliott**, called as a witness for defendant, and duly sworn, testified as follows:

Direct examination.

By Mr. Underwood:

I am a Major on duty in the Chief of Engineers office, handling administration of navigable waters, granting of permits, and so forth.

Q. Have you found any statement from the applicant for the permit here or anybody else of the use to which this island was to be put?

Mr. Dempsey: I object. The Government has no jurisdiction of the use to which this island is to be put.

The Court: I suppose this might bear on the question whether there was reliance on the privilege extended. Is that the theory?

Mr. Underwood: It was the theory to show so far as the Secretary of War was apprised; there was no permission to establish a race track on this land.

Mr. Dempsey: I object to it as irrelevant and immaterial.

The Court: You may answer.

Mr. Dempsey: Exception.

The Witness: There was none. There was nothing found in the application or in the hearings record that would indicate for what purpose the island was to be used.

By Mr. Underwood:

72 The green on this map marked "Miami Harbor and Approaches" in the northern part, island, and also the dredging area, was put in by draftsmen at

my direction. It was copied from drawings submitted with the application for the permit. It intends to represent what the applicant desired. That which is marked in green represents the approximate location of what the applicant desired to construct. These green lines indicate the outer edge of the dredging area and this severe cross-hatching represents the outline of the area; these heavy edged lines indicate the area from which the dredging is to be taken, the material to be dredged.

Cross-examination.

By Mr. Dempsey:

Can we stipulate that the improvement of the Florida East Coast Canal, now being made, is made pursuant to an act which became a law in 1927?

Mr. Underwood: All right. (A map marked "Miami Harbor and Approaches" was thereupon received in evidence, marked "Defendants' Exhibit B.").

Warren Thomas Hannum was called as a witness for defendant, duly sworn, and testified as follows:

Direct examination.

By Mr. Underwood:

I am a Colonel, Corps of Engineers; duty, Division Engineer, Gulf of Mexico Division, which includes the coastal and tributary waters between the Rio Grande River along the Gulf Coast around the Florida Peninsula to the mouth of the St. Johns River. I am familiar with Biscayne Bay. Its waters are tidal all the way from the extreme north end, all the way throughout the whole complete map, all this water (indicating). This bay is accessible from the ocean. I know what traffic there is here, have observed it, know its character, and have studied the record of it.

Q. Describe the character of the traffic both as to commodities carried, the kind of boats in which it is carried, and the draft of those boats?

Mr. Dempsey: I object to anything in conflict with what is stipulated.

73 The Court: We don't need any further proof of what is stipulated.

Mr. Dempsey: I do object seriously to any testimony as to the commerce north of the 79th Street Causeway. That is in conflict with the stipulation.

Mr. Underwood: All right. What we are going to develop is additional to that.

The Court: I overrule the objection.

Mr. Dempsey: Exception.

The Witness: A. I discuss first navigation south of the main causeway. I have the Chief of Engineers' Report for 1895, Appendix N, page 68: "In these waters"—describing this vicinity—"lies * * * Hawk Channel, an inside passage permitting a draft of about 12 feet from Cape Florida," around to Key West. This is taken advantage of by light draft vessels coasting along the shores. Communication is had with Biscayne Bay by these boats through the passages just under Cape Florida, Bear Cut and Norris Cut. In 1895 the traffic from this region passed out to and from Key West through this Hawk Channel down to Key West." On page 1569, I read: "The export products from this region and the Keys lying to the south are now sent in light draft sailing boats to Key West, and from there by steamer" Key West boats, to the north. The commerce originating there went to Key West, transhipped there in steamers and went up the coast, up to the north. "Merchant vessel tonnage coming in during 1894 aggregates 5,164 tons. This does not include the vessels chartered to take the pineapple crop or vessels coming into the bay on account of weather for food and fuel, also a large fleet of yachts coming here during the winter months. Actual tonnage of general merchandise brought in during 1894 * * * amounts to 3,985 tons. There were shipped out from Biscayne Bay and the Keys during 1894 20,000 dozen pineapples, 5,000 crates of pineapples, 50,000 peck crates of tomatoes, 10,000 carrier crates of tomatoes, 1,000 crates limes, 50,000 alligator hides, besides tropical fruit, cocoanuts, jellies, sponges, fish, et cetera, * * *." The channel is a 12-foot channel.

At that time the landing place was in or near the
74 mouth of the Miami River. Quoting from Document
662, 56th Congress, page 5:

"A large dock has been built on the west shore of the bay about three-quarters of a mile above the mouth of the river—"

That is the Miami River, in the vicinity of the present water front. It is the Florida East Coast Railroad dock, which they still retain.

“A 12-foot channel has been provided from this dock to the sea via the Cape Florida entrance.”

“—and the products of the vicinity of the mainland and of the neighboring keys formerly sent to Key West for shipment north are now shipped by rail from Miami direct. These improvements have been made by the Florida East Coast Railway Company.”

Page 20 quotes a letter from the Florida East Coast Railway Company to the District Engineer:

“The records of our office cover only the business which has been handled over our own docks. There has been some schooner business in and out of the port, both at Coconut Grove, south of Miami, and Lemon City, north of Miami.”

Coconut Grove is five or six miles south of the present Miami waterfront. There was at that time commerce out of Lemon City, which is about two miles below the western end of the 79th Street Causeway.

On page 6 of this same document I read the following:

“Briefly, at a place where, up to 1896, no steam vessel had been seen, except possibly small yachts—” “—a port has been created to and from which sail the vessels mentioned above, and through which there passed, in the calendar year 1899, 10,945 passengers and 21 thousand tons of freight.”

75 These are vessels of the Florida East Coast Steamship Company, running from Miami to Key West, Havana, and Nassau. The draft of these vessels are 10 feet 6 inches, 8 feet 6 inches, and 10 feet. The ship channel was first authorized in 1902. The authorized depth was 18 feet. Before the channel was cut, what I have said relates to the condition of the waters in their natural state, except that the Florida East Coast Railway, after 1896, excavated where necessary to make a 12-foot channel down past Cape Florida—through the Biscayne Bay channel. The United States, after the 18-foot channel was dug, authorized it to be made 25 feet, the present depth.

It is now being excavated to 30 feet. This channel across the bay passed through waters originally four and three feet in depth—about the same depth as up here.

By Mr. Dempsey:

I have been in charge of improvements in this vicinity for three years. I know of no protest against the issuance of any permit around the waters of those bays, and permits have been issued not only along this shoreline, but for structures along the shoreline, and the interior waters along this shoreline. I issue, for dock structures, and things like that, permits, one or two permits a month, in shallow water, two, three, or four feet deep. At the present time this is the channel (indicating), the ship channel that was used for coastwise and foreign commerce. Vessels drawing more than ten feet and also smaller vessels use that. It is more convenient.

By Mr. Underwood:

Q. Colonel, do you know whether vessels drawing four or five feet could navigate and operate outside and up the coast? A. It is possible. It is actually done.

Mr. Dempsey: I object on the ground that it is not a question of physical possibility.

The Court: I will let the Colonel proceed.

The Witness: There are numerous fishing boats and shrimp boats that operate from all these ports along the Florida coast that go outside to fish.

76 Mr. Dempsey: I object. It is obvious that these fishing boats do not go 400 miles to the nearest State line.

The Witness: No. They gather the fish and food there, which comes to the shore to be shipped by rail to the northern markets. I have now covered the portion of the bay south of the present channel. I will now attempt to cover the portion of the bay north. I will discuss the commerce which existed when this permit was issued. I quote commercial statistics of water-borne commerce for 1913, on page 503: "Intracoastal waterway from Jacksonville, Florida, to Miami, Florida. Freight traffic, 1931, domestic;

coastwise, receipts coming in from other points on the coast; northbound, in the intracoastal waterway; minerals, oil, fuel, 30 thousand tons."

That fuel oil was brought in in tankers, and transferred to barges and taken up through this intracoastal waterway to Fort Lauderdale. Fuel oil is not produced in Florida. It came in in tankers from the Gulf Coast. In 1931 this 8 by 100-foot waterway—the new intracoastal waterway—up parallel to and near the west shore of Biscayne Bay, had not been constructed. Then the channel was in service extending from the Miami waterfront across the bay toward Normandy Beach, thence to the northwest into the area to be occupied by this island, and then to the northeast, and headed up into the intracoastal waterway, through the north extremity of Biscayne Bay.

The new route, 8 x 100, was authorized in 1927, and required local cooperation, to the extent that the rights in the Florida East Coast Canal Company should be transferred to the United States, and they were transferred in 1929. The Government then dredged this 5 x 50 waterway, through to the St. Johns River. Later, they began the new waterway, 8 x 100, which will be completed within the next month or two.

During the boom year, 1925, at Miami the railroads in Florida were so congested that an embargo against rail shipments into Florida was issued. As a result, it was essential to get building materials and merchandise into this country to supply the needs. Denied rail transportation, they sought water transportation, and to bring vessels in here, to unload. This port became congested. For weeks numerous vessels were anchored outside in the ocean waiting accommodations inside. Under these circumstances and it being impracticable satisfactorily to put commerce in that way, the intracoastal waterway was used. In 1925, for the intracoastal waterway—5 x 50—the controlling depth being three and a half feet in places, the commerce for the entire waterway from Jacksonville to Miami, in the peak of the boom, was 703,000 tons.

The point of origin or destination is not stated, but, considering the situation, it is my opinion a good deal came from outside Florida. Supposing it originated outside

Florida, and had been brought into Jacksonville, it could, by this waterway, have been brought down into this bay. The area of greatest activity in this boom, I think, was in the vicinity of Miami, but it extended up the entire east coast of Florida, and in 1925 Miami and Jacksonville were the only seaports open, so that that commerce, if it came in by water to either of these ports, and was distributed by the intracoastal, 700,000 tons went either north from Miami or south from Jacksonville, and as Miami was congested, it is improbable that it went north from Miami. I have no breakdown of that tonnage, not in this text. I doubt if it is in any record, or can be found in any text. A map attached to a document entitled "The Intracoastal Waterway, Boston, Massachusetts, to the Rio Grande," has this: "War Department, Office of Chief of Engineers, Washington, D. C., December, 1933." Intracoastal Waterway at the present time is from the Delaware River to Key West, blocked only between Charleston, South Carolina and Wilmington, North Carolina, which will be opened within a year, producing a continuous intracoastal waterway from the Delaware River, of depths, in the northern portion, of 12 feet, and in the southern portion not less than 7 feet; with the high tide, over 10 or 11 feet—the tide is four feet.

78 An inspection boat which draws four feet has navigated the intracoastal canal from end to end. It has operated outside also, from Miami—not continuously, but at different times—on different sections of the coast outside, between the St. Johns River and the entrance to Miami Bay. There are also numerous yachts which come to Miami annually, from various States in the country.

There is, on page 504 of the 1931 commercial statistics, under the head of "Intracoastal Waterway from Jacksonville, Florida, to Miami, Florida," a statement showing the types of vessels northbound and southbound, and their drafts. Five feet, northbound, motor vessels, 1,620; barges, 366; southbound motor vessels, 1,620; barges, 325. "This is exclusive of yachts and pleasure vessels", page 452 of the report for 1932. Page 472 of that document gives a list of vessels using this waterway, northbound and southbound; draft, 6 feet down to and under three feet. There is a total northbound of 38,529 vessels of all drafts; southbound, the same figure. Under the head of "yachts", 5-

foot draft, northbound, 10; 4-foot draft, 125; 3-foot draft, 215; a total of 350; and the same figures for yachts southbound. The classifications other than yachts are motor vessels, barges, fishing boats, and charter and cruise boats.

I know that boats that traverse the inland waterway from Jacksonville to Miami have come from other States, because I have seen in the intracoastal waterway boats with names on them, and ports indicating that their home port is not in Florida. They were pleasure boats.

I have caused examination to be made of my office records as to the application of LeGro Properties for a permit to fill in the island in question, to learn whether there was set forth the use to which the island was to be put. No such record was found.

79 The yardage of material required for the proposed island fill depends upon the height to which it is raised. If to 10 feet above sea level to avoid being overflowed by high hurricane tides——

As the island is half a mile wide and a mile long, with an area of 1,600,000 square yards, filling five yards deep would take eight million cubic yards. The material that was dumped by the Government one thousand feet from the channel—where the dumping crossed the proposed island—would be just in the corner of it. This last refers to the material dredged under the 1932 contract. The dredging was done under my supervision. The amount of yardage to be taken out under that contract was between three and four million yards, and it extended over a length of channel of twenty-four miles. Less than 100,000 yards were dumped on the area of this island, for which 8,000,000 yards would be required if they made the fill plus 10 feet elevation. North and south of the 79th Street Causeway, the material dredged out was to be placed either to the east or to the west sides of the channel.

I read from the contract between the Government and the Arundel Co., for excavating the channel: "The location of spoil areas and the minimum allowable distances to the base of the spoil banks are shown on the maps referred to in paragraph 6."

"In order to permit access to shore landings and important waterways, and to provide adequate openings opposite drainage ditches, openings through the deposited material shall be left at such places as may be designated by

the contracting officer, the number of such openings not to exceed an average of two per mile."

I read from House Document 586, 69th Congress, 2nd Session, a report from the Chief of Engineers, of survey of intracoastal waterway from Jacksonville, Florida, to Miami, Florida, page 23: "It is estimated that the total value of exports in * * * 1925 will amount to \$30,000,000. Assuming that the existing ratio between imports and exports will obtain, the total tonnage of all
80 inbound and outbound commerce for * * * 1925 will be 1,380,000, with a value of \$70,000,000. The
81 differential between rail and water rates is * * * \$1.80 per ton * * * making the total difference between the cost of rail and water transportation \$2,500,000. The freight saving, * * * on the basis that 30 per cent of the entire commerce will take advantage of water transportation, will amount to \$750,000 annually, not including any saving which might accrue due to a consequent reduction of railway freight rates. There would probably also accrue a saving due to cheaper cost of transfer between boat lines as compared with transfer between rail and boat lines. * * * Railroads * * * charge 10 cents per crate for * * * transfer of citrus fruits to boat lines at Jacksonville; whereas boat lines make no charge when transfer is made between boats operating under the same general management and ownership, and only 4 cents per 100 pounds for transfers * * * between their lines and other boat lines. * * * By reason of the establishment of an ocean steamship service between Jacksonville and Miami, made possible by deepening the channel entrance at Miami, the rail rates on commodities which may be carried by sea have been materially reduced, in some cases as much as 50 per cent, * * *."

(House Document No. 586, 69th Congress, Second Session, was marked Defendants' Exhibit No. C and received in evidence.)

The Witness: The area of two islands on which the permit had expired is considerably less than the area of the new proposed island.

All these islands were under one permit, and there were four or five others down the bay, under the expired permit.

Testimony was introduced to indicate that this island is the same island that was proposed under the previous permit. It is not the same.

Together, these two islands under the expired permit might be greater than the area of this one island.

82 Mr. Underwood: I reoffer this certified copy of this report about the inland waterway, and the map of it.

Mr. Dempsey: I object to it.

The Court: That will show how much is artificial and how much is natural.

Mr. Underwood: Yes.

The Court: The thought I had in mind was that probably a lot of that was artificial.

The Witness: They use the natural waterways and cut through the divides between the natural bodies of water.

Mr. Underwood: All we need is this part, page 3, as to the waterway from Beaufort to St. Johns River, and the waterway from Jacksonville to Miami—those two paragraphs. All I ask is that it go in to show where the waterway is, which will be shown by the map; and the work which has been done on the different sections, and whether or not it has been completed as to those sections.

Mr. Dempsey: I do not object as to this waterway from Jacksonville to Miami.

Mr. Underwood: I want to get in the one just above it, which takes it out of the State.

Mr. Dempsey: This is the place that is involved, and that is not involved at all.

The Court: You may have an exception.

(Statement entitled "The Intracoastal Waterway, Boston, Massachusetts to the Rio Grande," was marked Defendants' Exhibit D, and received in evidence.)

Mr. Underwood: This contract introduced is the original. We ask to withdraw that and substitute a copy.

The Court: Or have copied into the record what each side wants, and take it back.

Cross-examination.

By Mr. Dempsey:

83 Q. I notice in House Document 1147, 65th Congress, Second Session, page 14, this statement (read-

ing): "The freight traffic to be anticipated on a canal down the east coast of Florida will be local traffic, in the distribution of general materials and supplies from the seaports, and the collection of agricultural and other products at the shipping points." A. I think that statement is probably correct, that in that intracoastal waterway the major portion of the traffic will be from the various ports, to and from the various ports between Miami and Jacksonville, coastwise, to and from those ports and the northern ports.

Q. What will be done is just what was said here. You will bring in, first, the merchandise to Miami, St. Lucie, or Jacksonville, and you will transfer it to a smaller vessel and distribute it to the nearby points. A. Yes, that is going on now from Jacksonville.

Q. Second, you will gather up agricultural products in small boats to these seaports, and transfer them from the small boats, and then you will take them from the seaports to market. A. If they are going to go any appreciable distance, yes.

Q. I notice this statement in the same report (reading): "For this traffic a canal of adequate dimensions should form a valuable feeder not only for Jacksonville but also for Miami Harbor and St. Lucie Inlet when these two harbors are improved as contemplated by projects now in force." A. That statement would be true that the intracoastal waterway would be a feeder to those harbors for the interstate commerce that is going to and from points up north, on the Atlantic Coast. (R. 235.)

Q. Here is another statement in that report (reading): "Ultimately such a waterway would be required to afford cheap and rapid transportation for the fruits and
84 vegetables raised so abundantly along the route to the nearest deep seaport, the St. Johns River at and below Jacksonville." That would mean to the nearest deep seaport, whichever it might be? A. Yes. That citrus fruit is going out from Miami and Palm Beach now, and will go out from Fort Pierce to the northern markets.

Q. The next is the 69th Congress, Second Session, House Document 586 (reading): "The development of an inland waterway will be of immediate benefit to owners of lands along the canal in that it will facilitate shipment of their products to the several deep water ports now being developed on the line of the canal at such points as Miami, Fort

Lauderdale, Palm Beach and Fort Pierce." A. That is true, undoubtedly. They are taken to those ports for transshipment by ocean ships up to the northern and foreign markets. There is considerable freight in citrus fruits between Florida ports and foreign ports, England and France.

Q. (Reading:) "Ports for ocean-going vessels are being developed at Fort Pierce, Palm Beach, and Fort Lauderdale. An inlet connection has been formed for the development of a similar port at St. Lucie Inlet (Stuart, Florida). Miami already has ocean-going connections. There can be no doubt that were the canal available a considerable traffic would develop thereon between the several cities named and the smaller communities situated on the canal to the north and south of the several ports named. A. That is undoubtedly true. For years the Gulf Refining Company has been distributing oil and oil products from Jacksonville to the various points down the intracoastal canal, as far as Fort Pierce, 250 miles. (R. 237, 238.)

1931 is the minimum record for the past 10 or 15 years.

85 In 1932 it was more than double that. That is an average of 160 tons per mile of improvement. The tonnage of Miami is now over one million tons, and during the peak year, 1925, was over two million; of Jacksonville is three million tons; at those intermediate ports it is 40,000; at Fort Pierce this year it will be over 100,000—it is growing very rapidly there; at Palm Beach, this year it will be between 50,000 and 100,000; and at Port Everglades it is now 40,000 to 50,000 tons.

Before they had deep water, the railroad operated four boats from Miami to Key West, from the railroad terminal on the water front at Miami up near the west end of the causeway, through there to Key West, to Nassau, and to Havana. The Florida East Coast first operated from Miami, and afterwards from Key West. They finished in 1914, and then they had a line of steamers from Key West to Havana. Now, most traffic from Florida to Havana goes from Miami on steamers or by airplane. Not only has the condition changed from that boom period in Florida, so that they not only have no shortage of transportation facilities, but the Seaboard and the Florida East Coast, through lack of business, are both, and have been for some years, in the hands of receivers.

By Mr. Dempsey :

Q. Do you agree with this statement in the stipulation of facts and in the report of the engineers? "If commerce should sufficiently develop in the future to justify the expense of a number of these harbors, and if they were provided, it would not decrease the usefulness of the intra-coastal waterway. Through shipments between Jacksonville and Miami might decrease but the intracoastal waterway would then be used extensively for local distribution of the greatly increased amount of freight to and from each completed deep-water harbor." A. It is a very reasonable deduction. Since I have been the Division Engineer for the Biscayne Bay district there have been on the average of two applications a month for the building of structures in that bay, which have been granted, and there has not
86 been a single protest. There have been fills made in connection with some of those structures. Bulkheads were built and then dredged from outside and deposited the material inside the bulkhead to make ground. I have refused no permits.

By Mr. Dempsey :

The Witness: I have not issued any permits for the construction of any inland in Biscayne Bay, or any filling in Biscayne Bay itself. The filling which I have mentioned was along the shore line, in connection with the construction of bulkheads, and it was placed behind those bulkheads in order to bring the ground up to a reasonable height that the owner desired, to make waterfront for himself. Those structures are generally distant from the present channel of the intercoastal waterway, north of the 79th Street Causeway. No applications have been made for the filling in of islands since I have been there. In connection with dredging we have had certain fills made. Those artificial islands south of the main causeway which have been made in the disposal of dredged material are, under the present contract, being increased in size. We are dumping some of the material excavated from the main channel—not all the material.

The material that is being excavated from the turning basin is being placed north of the causeway, to enlarge the firm land. It belongs to the City. Some material taken

out of the channel at the west end, adjacent to the turning basin, is being placed at the same point, to increase the firm land. The material that is being taken out to the east of that is being placed on these islands to the south of the old islands which were formerly established by the dumping of the dredged material, and we are requiring the contractor to keep that not below a certain elevation, and more or less distributed so that it makes a presentable appearance. We dispose of the material there in the most economical method possible. We maintain the right of the United States
87 to dump in its navigable waters, and we dump in the navigable waters alongside the channel to get rid of it in the most economical way possible.

By Mr. Dempsey:

Q. You dump the dredged material, so far as the southern part of the bay is concerned, to increase the mainland area on the north and to increase the islands on the south of the main channel. That is a fact, is it not? A. We are not dumping it there to make islands. The City of Miami objects to these islands and has tried to persuade us to take them out and not dump anything more there. In spite of that we are dumping there. Because we have the right to dump there, and it is much cheaper to dump there than it is to haul it out to sea. The result of that dumping is not to enlarge the mainland.

The last time I was in Miami was the 20th of October. I did not go out then to inspect the dumping of the material for the excavation of the channel. I have seen that dumping of material north of the 79th Street Causeway for a couple of miles there since it was commenced. I made a trip through there about a year ago or longer, when two of the dredges were working—one just north of the main causeway and the other in the very northern part of the Bay. I have not made any detailed survey of this dump as it was finally completed.

By Mr. Dempsey:

The dumping on the north side of this material to enlarge the land there was provided for in the contract. We did that in cooperation with the City. We found that they wanted that part of the land filled in, and it did not cost us any more to fill that in than it would to take it somewhere

else, so we put it in there. The City wants it for the purpose of some development of some fair grounds in connection with the South American Exposition grounds.

The foregoing statement of the evidence is hereby agreed to. August 23, 1935.

S. WALLACE DEMPSEY,
Attorney for Plaintiff.
LESLIE C. GARNETT,
United States Attorney,
Attorney for Defendant.

88 Be it further remembered that the foregoing contains the substance of all of the evidence given on the hearing of this cause, and each of the exceptions stated to have been taken by the attorney for the plaintiff were so taken and were duly allowed and noted by the court, and in order that each and every thereof may be preserved and made of record this statement of evidence is duly stated, approved and signed, and ordered to be made of record in the above-entitled cause this 2nd day of October, 1935.

By the Court.

JOSEPH W. COX,
Justice.

89 DEFENDANT'S EXHIBIT A.

Eq. #53979.

Filed Aug. 19, 1935. Frank E. Cunningham, Clerk.

United States of America,
War Department.

Washington, September 20, 1934.

I hereby certify that the photostat copies attached hereto are true copies of papers on file in the Office, Chief of Engineers, relating to the application of LeGro Properties, Inc., for a permit to construct an island in Biscayne Bay, Florida, and bearing E. D. file numbers as follows:

7510 (LeGro Properties, Inc.) 4.
7510 (LeGro Properties, Inc.) 4/28.

7510 (LeGro Properties, Inc.) 4/8/12.
7510 (LeGro Properties, Inc.) 125.
7510 (LeGro Properties, Inc.) 145.
7510 (LeGro Properties, Inc.) 149/1.
7510 (LeGro Properties, Inc.) 161.
7510 (LeGro Properties, Inc.) 161/1.
7510 (LeGro Properties, Inc.) 161/2.

E. M. MARKHAM,
Major General, Chief of Engineers.
GM.

I hereby certify that E. M. Markham, who signed the foregoing certificate, is the Chief of Engineers, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Geo. H. Dern, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 21st day of September, 1934.

[Seal War Office, United States of America.]

GEO. H. DERN,
Secretary of War.
By F. M. HOADLEY,
Assistant Chief Clerk.

War Department Form No. 7.

90

H. W. Thomas,
Ten Hundred Lincoln Road Building,
Miami Beach, Florida.

April 30, 1931.

Major George E. Brown,
U. S. Engineers Office,
Miami Beach, Florida.

DEAR SIR:

I hereby make application for a United States War Department permit for dredging, filling, bulkheading and other work necessary for the construction of an island north and appurtenant to the Seventy-ninth Street Cause-

way in North Biscayne Bay, for LeGro Properties, Inc. The necessary sketches, waivers and data are herewith enclosed.

Trusting this will meet with your approval, I am

Very truly yours,

H. W. THOMAS.

HWT:T.

91

April 17th, 1931.

To whom it may concern:

We hereby authorize H. W. Thomas to prepare the necessary data and sketches for a United States Government War Department permit application, for the construction of an island north and adjoining the Seventy-ninth Street Causeway.

LEGRO PROPERTIES, INC.,
By F. C. B. LEGRO.

Attest:

A. L. McCARTHY,
H. W. THOMAS.

92

Permits 2933.

1st Ind.

(Report on an application for a permit for work in navigable waters of the United States.)

U. S. Engineer Office.

Jacksonville, Fla., June 10, 1931.

To the Chief of Engineers, U. S. Army,
Washington, D. C.

(Through the Division Engineer, Gulf of Mexico Division,
New Orleans, La.)

1. Name of applicant: LeGro Properties, Inc., c/o H. W. Thomas, 1000 Lincoln Road Building, Miami Beach, Fla.

2. Proposed location of work: (Waterway) (Nearest town) Biscayne Bay, Fla., northerly from the middle causeway section of the 79th Street Causeway (Distance from mouth of waterway).

3. Has necessary State authority been obtained? See Par. 8 below.

4. Character of proposed work: The construction of bulkheads, dredging, and filling, developing an island.

5. Attitude of municipal authorities: Favorable, as indicated by the inclosed waivers from the City Council of Miami Beach and from the City Commission of Miami.

6. Date of sending information to other interested parties, and summary of objections offered, at public hearings or otherwise, with comments of the District Engineer thereon: Waivers of objection to the proposed work accompanied the application from the County Commissioners of Dade County, from the Northeast Miami Improvement Association, from the North Beach Realty Company, from Joseph H. Adams, and from the Municipal Land Company. There also accompanied the application a letter from Mr. LeGro, President of LeGro Properties, Inc., setting forth certain facts relative to this application and a previous permit issued to a company with which he was connected and stating objections made by two other parties, Indian Creek Golf Club and Normandy Beach Properties, Inc. A notice of this application was issued by this office on May 21, 1931. A copy of this notice together with the list indicating its distribution are inclosed. Copies were mailed to both the Indian Creek Golf Club and to Normandy Beach Properties, Inc. Objections to the proposed work were submitted by the Normandy Beach Properties, Inc., by letter of May 29, 1931, which letter is inclosed. These objections were based upon the understanding that the applicant had not acquired a State dredging permit to the entire area, and upon the fact that the dredging area proposed overlapped upon the area authorized for dredging under a permit issued to Normandy Beach Properties, Inc.—See E. D. 7510 (Normandy Beach Properties)—4, April 26, 1926.

With respect to the above objections, the application by LeGro Properties, Inc., is accompanied by a certified copy of minutes of a meeting that the Trustees of the Internal Improvement Fund held on April 22, 1931, at which meeting the Trustees agreed to designate the area, as shown on the blue print filed with the Secretary, as the location from which fill material is to be taken by F. C. B. LeGro for filling land described in the Trustees' Entry #17274-A. The ap-

93 plication was also accompanied by an affidavit by Mr. LeGro that the blue print presented to the Trustees of the Internal Improvement Fund, mentioned above, is the same which accompanies the application submitted to this office for a permit. It hence appears that LeGro Properties, Inc., to whom Mr. LeGro has waived his rights in the premises, have the necessary State permit. With respect to the overlapping of this area upon the dredging area covered by the permit issued to the Normandy Beach Properties on April 30, 1926, and extended to December 31, 1932, Normandy Beach Properties did not submit with their application evidence that they had title to the area to be dredged, and it is believed that a dredging permit issued by the State does not give any title, but merely authorizes dredging over a specified area. Inasmuch as the LeGro Properties, Inc., have a permit from the State to dredge over the area indicated on the drawing, and as a War Department permit does not grant any exclusive privileges, but merely expresses the assent of the Federal Government to the work authorized so far as concerns the public rights of navigation, it is believed that this objection by the Normandy Beach Properties, Inc., can not be given material consideration. Normandy Beach Properties, Inc., have been so advised.

7. Views of District Engineer concerning probable effect on:

(a) Navigation, present or prospective, with reasons: As indicated upon the permit drawings, the proposed island will not interfere with the new alignment of the Intracoastal Waterway channel in this section of the bay. The proposed dredging will afford deeper water and will probably result in the tidal currents flowing more freely in this section of the bay, and it is thought it will tend to reduce the maintenance work of the above waterway in this vicinity. The proposed construction will not interfere with present or prospective commerce.

(b) Harbor lines: No harbor lines have been established at this locality. The proposed construction would undoubtedly influence the future establishment of such lines, but it is believed that lines established to include the proposed island would not be objectionable.

(c) Flood heights and drift: Due to the dredging proposed, with the consequent freer flow of tidal waters, it is

believed that the proposed construction will not have any detrimental effect upon flood heights. As proposed, the construction will not have a tendency to collect drift material.

8. Remarks: On September 11, 1925, the Division Engineer issued a permit to the North Venetian Islands Company, F. C. B. LeGro, Vice-President, Miami, Fla., authorizing it to construct bulkheads and to dredge, the dredged material to be deposited behind the bulkheads, forming four islands in Biscayne Bay to Miami, Fla. In accordance with Condition (i) of above permit, the authority granted thereby expired on the 31st day of December, 1928. An application for extension of the time for the completion of the work was submitted by Mr. LeGro, but as this application was received after the date of expiration, and as Mr. LeGro did not have the authority of the North Venetian Islands Company to submit the application for extension, the Chief of

94 Engineers declined to extend the time limit, but state that whenever further operations are intended a new application for a permit should be made. This present application is submitted accordingly. The islands in this portion of the bay, as authorized by the above permit to the North Venetian Islands Company, are shown upon the drawing, Sheet No. 5, accompanying the present application, together with the island and dredging area for which a permit is now requested. It is believed that the island now desired will not be more objectionable than those previously authorized.

The question was taken up with Mr. LeGro as to whether or not he had the title to the bay bottom upon which the proposed island is to be located. This question was raised because of the statement made in the minutes of the meeting of the Trustees of the Internal Improvement Fund held on April 22, 1931, that Mr. LeGro had proceeded to clear up and put back into the State title to the land covered by Entry #17274-A. It appears that North Venetian Islands Company failed and that the title to this area was involved, hence Mr. LeGro secured title again by foreclosure proceedings and turned that title back to the State of Florida. Following this, and in accordance with an agreement with the State, the State has now advertised for objections to the sale of the bay bottom land, to be covered by the island now

proposed, and other areas to Mr. LeGro. A copy of this agreement is inclosed, together with copies of the public notice which appeared in the Miami Herald on Monday, June 1, 1931. In accordance with this agreement and notice, Mr. LeGro has not yet secured actual title to this bay bottom, but has the agreement with the State that title will be transferred to him subsequent to the meeting of the Trustees of the Internal Improvement Fund on June 24, 1931, as stated in the public notice referred to. There is little doubt but what the title will be transferred to Mr. LeGro. Due to the fact, however, that this transfer will undoubtedly be delayed for a few weeks subsequent to the meeting in the ordinary procedure of preparing the papers, and the further fact that Mr. LeGro and his associates are anxious to proceed with certain preliminaries incident to organization, etc., which procedure can not well be undertaken until the permit is issued, or evidence received that it will be when actual title is acquired to the bay bottom land, Mr. LeGro has requested that this application be forwarded at this time for consideration by higher authority, and that, if consistent with the policy of the Department, the permit requested be issued, if the plans are approved. If, however, the Department does not desire to issue the permit until evidence of title is secured, he requests that he be informed that the permit will be issued upon submission of proper evidence that title to the bay bottom land has been acquired from the State, provided that the plans for the proposed work are otherwise acceptable to the Department.

9. Recommendations: It is recommended that, upon submission of the proper evidence that the title to the bay bottom to be occupied by the proposed island has been transferred to Mr. LeGro or the LeGro Properties, Inc., by the Trustees of the Internal Improvement Fund, the permit requested be granted, to "construct bulkheads and to dredge, the dredged material to be deposited behind the bulkheads, creating an island," subject to the conditions of Form No. 96, W. D., O. C. of E., revised April 28, 1922. It is further recommended that Mr. LeGro be advised that the permit will be issued upon receipt of proper evidence of title.

L. V. FRAZIER,
Lt. Col., Corps of Engineers,
District Engineer.

Inclosures:

Authority for application.
 Waiver by City Council, Miami Beach.
 Waiver by City Commission, Miami.
 Waiver by County Commissioners, Dade County.
 Waiver by Northeast Miami Improvement Association.
 Waiver by North Beach Realty Co.
 Waiver by Joseph H. Adams.
 Waiver by Municipal Land Co.
 Minutes, Trustees Internal Improvement Fund.
 Letter of F. C. B. LeGro dated 5/11/31.
 Copy of notice of application.
 List to whom notice was mailed.
 Objection by Normandy Beach Properties, Inc.
 Agreement Trustees I. I. Fund and F. C. B. LeGro.
 Legal notice as published.
 5 Tracings and 3 blue prints of each.

96

2nd Ind.

Miami Harbor—4/74.

Office, Division Engineer, Gulf of Mexico Division,
 New Orleans, La.,

June 13, 1931.

To the Chief of Engineers:

1. Concurring in the views and recommendations of the
 District Engineer.

MARK BROOKE,
Lieut. Col., Corps of Engineers,
Division Engineer.

Inclosure:

No change.

7510 (LeGro Properties Inc.)—4.

3d Ind.

Office, C. of E.

June 23, 1931.

To the Division Engineer,

Gulf of Mexico Division:

1. This application is approved under the provisions of
 Section 10 of the River and Harbor Act of March 3, 1899,
 subject to the conditions of Form No. 96, W. D., O. C. of E.,
 revised April 28, 1922.

6—6577a

2. The Division Engineer is hereby authorized to issue permit accordingly, upon proper evidence that the applicant has title to the lands involved.

By authority of the Secretary of War:

G. B. PILLSBURY,
Brigadier General,
Acting Chief of Engineers.

20 Inclos., viz: Subs. 8-27 Plans.

7510 (LeGro Properties Inc.)—4, Subject: Applications for permit.

4th Ind.

Miami Harbor—4/74.

Office, Division Engineer, Gulf of Mexico Division,
New Orleans, La.

July 1, 1931.

To the District Engineer, Jacksonville, Fla.:

1. With permit for delivery to permittee, copy for the district office files and copy for the inspector of work.

MARK BROOKE,
Lieut. Col., Corps of Engineers,
Division Engineer.

97 Inclosures:

Permit in triplicate, with Subs. 13-22 attached.

Permits 2933.

5th Ind.

Office, District Engineer,

Jacksonville, Fla., July 7, 1931.

To the Chief of Engineers, U. S. Army,
Washington, D. C.

(Through the Division Engineer, Gulf of Mexico Division,
New Orleans, La.)

The permit above indicated has been mailed this date to the permittee and the copies retained for the files of the District Engineer.

L. V. FRAZIER,
Lt. Col., Corps of Engineers,
District Engineer.

Inclosures withdrawn.

7510 (LeGro Properties Inc.)—4. Subject: Application for permit.

6th Ind.

Miami Harbor—4/74.

Office, Division Engineer, Gulf of Mexico Division,

New Orleans, La., July 9, 1931.

To the Chief of Engineers:

1. The applicant having submitted title to land involved, permit was issued to the LeGro Properties, Inc., on July 1, 1931. Record copy of permit is forwarded herewith.

2. Photostat copy of deed is being transmitted today to the Chief of Engineers by first indorsement of the division engineer on letter of the district engineer, Jacksonville, Fla., dated June 26, 1931.

MARK BROOKE,
Lieut. Col., Corps of Engineers,
Division Engineer.

Inclosure:

Copy of permit with Subs. 8-12 and 28 acpg., five tracings attached.

98

War Department

Note.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation. (See *Cummings v. Chicago*, 188 U. S., 410.)

Permit

Office of Division Engineer, Gulf of Mexico Division,

405 Masonic Temple Building,

New Orleans, La., July 1, 1931.

LeGro Properties, Inc.,

c/o H. W. Thomas,

1000 Lincoln Road Building,

Miami, Beach, Fla.

Referring to written request dated April 30, 1931, addressed to the Engineer Office, Miami Beach, Fla., I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of War, to (here describe the proposed structure or work) construct bulkheads, to dredge and fill, developing an island in (here to be named the river, harbor, or waterway concerned) Biscayne Bay at (here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass) Miami, Florida, northerly from the middle section of the 79th Street Causeway, in accordance with the plans (or drawings; give file number or other definite identification marks) shown on the drawing attached hereto in 5 sheets, entitled " * * * Permit Application for Dredging, Filling and Bulkheading in developing an Island in North Biscayne Bay, Miami, Florida, for LeGro Properties, Inc., April 2, 1931," subject to the following conditions:

99 (a) That the work shall be subject to the supervision and approval of the District Engineer, Engineer Department at Large, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment, the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no

large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the Bureau of Lighthouses, Department of Commerce, shall be installed and maintained by and at the expense of the owner.

(h) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(i) That if the structure or work herein authorized is not completed on or before thirty-first day of December, 1934, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

By authority of the Secretary of War.

MARK BROOKE,
Lieut. Col., Corps of Engineers, U. S. A.,
Division Engineer, Gulf of Mexico Division.

5 drawings attached.

Special Authority: E. D. 7510 (LeGro Properties, Inc.)
—4 O. C. of E., June 23, 1931.

Here follows photolithograph of map, side folio 100.)

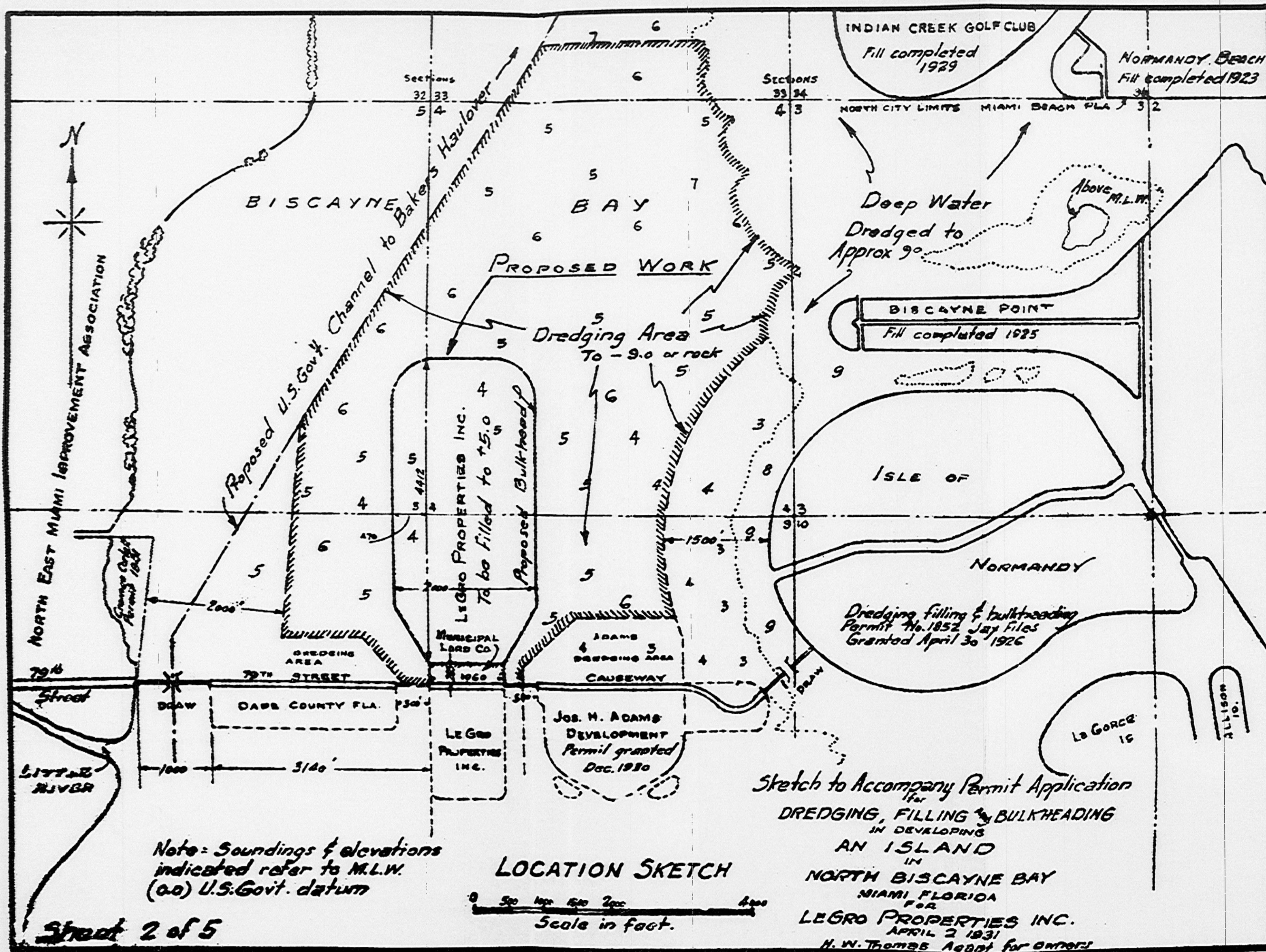
101

Permits—2933.

Serial No. 12-31.

Notice of Public Hearing.

Whereas, the LeGro Properties, Incorporated, were authorized by the Secretary of War, by permit dated July 1, 1931, to construct bulkheads, dredge and fill to develop an island in Biscayne Bay at Miami, Florida, to extend northerly from the middle section of the 79th Street Causeway, for a distance of 4,697 feet and to have a maximum width of 2,000 feet;



BEST COPY AVAILABLE

from the original bound volume

And whereas, the Indian Creek Club has presented a petition and brief alleging that these bulkheads, dredging and fill would be an obstruction to navigation warranting the reconsideration of the authorization to construct said works;

A public hearing will be held by the undersigned in the Circuit Court Room, fourth floor, Dade County Court House, Miami, Florida, at 10:00 A. M., Friday, September 4, 1931, at which all interested parties will be afforded an opportunity to present facts and arguments relating to the effect of said construction on the public rights of navigation.

Oral statements will be heard, but for accuracy of record all important facts and arguments should be submitted in writing, as the records of the hearing will be forwarded for consideration by the War Department. Written statements may be handed to the undersigned at the hearing or mailed to him beforehand.

Interested parties are advised that the authorization conveyed by the permit does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights or any infringement of Federal, State or local laws or regulations. It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation. The hearing will be limited to matter relating to the effect of the authorized works on navigation.

Plans for the proposed island may be seen at the U. S. Engineer Office, 7th floor, Florida Theater Building, Jacksonville, Florida, or at the U. S. Engineer Sub-office, Miami Beach, Florida.

L. V. FRAZIER,
Lt. Col., Corps of Engineers,
District Engineer.

U. S. Engineer Office, Jacksonville, Florida, August 13, 1931.

102 S. C. Form No. 9.

Signal Corps, United States Army.

War Department Message Center.

Received at Room 3441, Munitions Building, Washington, D. C.

Postal Telegraph-Cable Co.

W3. 11. Govt.—CB. Jacksonville, Fla. 956A. Sept. 10, 1931.

Chief of Engineer—

United States Army, Washington, D. C.

Retel ninth no work done under permit granted LeGro Properties Incorporated.

HEMENWAY.

1028A.

103 War Department.

United States Engineer Office,

Fifth Floor, Masonic Temple, Jacksonville, Fla.

Moved to Florida Theatre Building, 128 E. Forsyth Street.

Refer to File No. P. 2953.

September 11, 1931.

LeGro Properties, Inc.,

F. C. B. LeGro,

c/o H. W. Thomas,

1000 Lincoln Road Building,

Miami Beach, Florida.

DEAR SIRs:

This is to notify you that work authorized under the permit issued to you by the Division Engineer on July 1, 1931, is temporarily suspended under condition (a) of said per-

mit, pending decision of the Secretary of War on matters presented at the hearing held at Miami on September 4th.

Very truly yours,

L. V. FRAZIER,
*Lt. Col., Corps of Engineers,
District Engineer.*

Copy furnished:

U. S. Engineer Sub-Office, Miami Beach, Fla.

Address reply to The District Engineer, U. S. Engineer Office, P. O. Box 45, Jacksonville, Fla.

Served Sept. 14/31.

104

War Department,
Office of The Chief of Engineers,
Washington.

Address reply to Chief of Engineers, U. S. Army, Washington, D. C.

Refer to File No. 7510 (LeGro Properties, Inc.)-82.

October 1, 1931.

Subject: Protest against construction of an island in Biscayne Bay near 79th Street Causeway, Miami, Fla.

To: The Secretary of War.

1. Under date of July 1, 1931, the Division Engineer, Gulf of Mexico Division, with the approval and authorization of this office, issued to the LeGro Properties, Inc., a permit to construct bulkheads, to dredge and fill, developing and island in Biscayne Bay, Miami, Florida, north of the middle section of the 79th Street Causeway.

2. About one month after the issuance of the permit numerous protests against the project were received. On August 5, the Indian Creek Golf Club petitioned for a hearing on the matter, that it might submit evidence as to the advisability of revoking the permit on the grounds that the project would constitute an unreasonable obstruction to the navigable capacity of Biscayne Bay north of the 79th Street Causeway.

3. A public hearing was held at Miami, Florida, on September 4 and 5, at which time all parties at interest were

afforded an opportunity to present evidence bearing on the premises.

4. I have reviewed the hearings on the protest and have examined the proposed project. I am impressed by the following conclusions:

(1) Biscayne Bay is not primarily a commercial port but a winter playground where a very large investment has been made in winter homes.

(2) The upper end of Biscayne Bay has been improved around its borders for home purposes and the adjuncts of these homes.

(3) The proposed island occupies space that is now available for navigation by pleasure boats, which navigation is that which is most suitable to the locality.

105 (4) The adjacent property owners are, as a rule, opposed to the building of the island, and reasonably so, both from a navigation standpoint and from a standpoint of injury to their property, for this reason and for the reason that the race track would injure the investment made by them.

(5) It appears to be an extravagant scheme to build a race track at such expense where there are other places where a track can be built more economically and still serve the purpose without injury to private property of great value, and further be more accessible to the public.

5. From the conclusions above given I believe that this permit would not have been granted in the first instance had all conditions surrounding it been known.

6. In view of the foregoing and other facts brought out at the hearing on September 4 and 5, 1931, I am of the opinion that the proposed work will constitute an unreasonable obstruction to navigation. I am therefore obliged to recommend that the permit issued by local engineer authority be revoked. Your approval or disapproval of this recommendation may be indicated below.

LYTLE BROWN,
Major General, Chief of Engineers.

Approved,
F. H. PAYNE,
Acting Secretary of War.

Inclosures listed on attached sheet.

106

36 Inclosures, viz:

Sub. 28 of Ser. 4—Permit July 1/31 to LeGro Properties, Inc., with subs. 8-12 of Ser. 4—Plans attached;

Serial 82—Protest of Indian Creek Golf Club with Report of Dist. Engr. attached;

Sub. 1 of Ser. 82—List of parties notified;

Sub. 2 of Ser. 82—Notice of Public Hearing;

Sub. 3 of Ser. 82 }
Sub. 4 of Ser. 82 } —Briefs in support of permit;

Sub. 6 of Ser. 82—Exhibits;

Serial 152—Description of Exhibits;

Sub. 1 of Ser. 152—Report of Hearing;

Sub. 2 of Ser. 152—Exhibits;

Subs. 4-14 of Ser. 152—Maps and Prints;

C. & G. Survey Chart—Not marked;

Serial 154—Report of D. E. on brief of petitioner;

Sub. 1 of Ser. 154—Brief on behalf of petitioner;

Serial 160—Report of Dist. Engr. on brief for LeGro Properties;

Sub. 1 of Ser. 160—Brief on behalf of LeGro Properties;

Sub. 2 of Ser. 160—Statement of Colonel Youngberg.

Sub 3-5 of Ser. 160—Opposition to views of Col. Youngberg.

7510 (LeGro Properties, Inc.) 161.

2nd Ind.

Office, C. of E.

October 5, 1931.

To the Division Engineer,
Gulf of Mexico Division,
New Orleans, La.

1. Attention is invited to the action of the Department shown by the foregoing letter of the Chief of Engineers and the approval by the Acting Secretary of War.

2. The Division Engineer will inform the LeGro Properties, Inc., that the Acting Secretary of War, after a thorough consideration of all facts brought out at the hearing held at Miami, Florida, on September 4 and 5, 1931, has

revoked the permit issued on July 1, 1931, to construct bulkheads, to dredge and fill, developing an island in Biscayne Bay north of the 79th Street Causeway.

LYTLE BROWN,
Major General, Chief of Engineers.

107

Miami Harbor 4/74.

3d Ind.

Office, Division Engineer, Gulf of Mexico Division.

New Orleans, La., October 8, 1931.

To the District Engineer,
Jacksonville, Fla.:

1. For transmittal of Letter of Division Engineer to LeGro Properties, Inc., and report of action taken.

WARREN T. HANNUM,
*Lieut. Col., Corps of Engineers,
Division Engineer.*

1. Inclosure:

Letter to LeGro Properties, Inc.

Rec'd U. S. Engr. Office, Jacksonville, Fla., Oct. 12, 1931.

P. 2933.

4th Ind.

Office, District Engineer, Jacksonville, Fla.

October 14, 1931.

To the Division Engineer,
Gulf of Mexico Division,
New Orleans, La.:

1. The above letter to LeGro Properties, Inc., has been transmitted by letter of this date, a copy of which is inclosed.

2. When received, the permit of July 1, 1931, will be forwarded to the Division Office, together with the copies

thereof from the files of the U. S. Engineer Sub-Office, Miami Beach, Fla., and the District Engineer's files.

For and in the absence of the District Engineer.

N. L. HEMENWAY,
1st Lieut., Corps of Engineers,
Military Assistant.

Inclosure—

CC. Letter to LeGro Properties, Inc., dated Oct. 14, 1931.

Received, Div. Engineer, Gulf of Mexico Div., New Orleans, La., Oct. 19, 1931.

108 Miami Harbor 4/74.

5th Ind.

Office, Division Engineer, Gulf of Mexico Division.

New Orleans, La., October 19, 1931.

To the Chief of Engineers:

W. T. H.

2 Inclosures:

Copy of letter to LeGro Properties, Inc., from Div. Engr.

Copy of letter from Dist. Engr. to LeGro Properties, Inc., inclosing above letter.

Subs. 1-2 acpg.

Office Chief of Engineers, Oct. 21, 1931.

109 War Department,
Office of the Division Engineer,
Gulf of Mexico Division,
405 Masonic Temple, New Orleans, La.

October 8, 1931.

LeGro Properties, Inc.,
% H. W. Thomas,
1,000 Lincoln Road Bldg.,
Miami Beach, Fla.

DEAR SIRs:

The Chief of Engineers, U. S. Army, has directed me to inform you that the Acting Secretary of War, after a

thorough consideration of all the facts brought out at the hearing held at Miami, Fla., on September 4 and 5, 1931, has revoked the permit issued to you by this office on July 1, 1931, to construct bulkheads and to dredge and fill, developing an island in Biscayne Bay northerly from the middle section of the Seventh-ninth Street Causeway, at Miami, Fla.

It is requested that you acknowledge receipt of this letter and return the permit as early as practicable to the District Engineer, Jacksonville, Fla.

WARREN T. HANNUM,
*Lieut. Col., Corps of Engineers,
Division Engineer.*

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War Department,
United States Engineer Office,
Florida Theatre Building,
128 E. Forsyth Street, Jacksonville, Fla.

Refer to file No. —, Permits 2935.

October 14, 1931.

LeGro Properties, Inc.,
%H. W. Thomas,
1000 Lincoln Road Bldg.,
Miami Beach, Fla.

DEAR SIRs:

There is inclosed a letter from the Division Engineer, advising you of the action taken by the Department revoking the permit issued to you by the Division Engineer on July, 1931.

The return of the above permit is requested. Kindly forward it to this office through the U. S. Engineer Sub-Office, at Miami Beach, Florida, which office will forward it to this office, together with the copy of the permit from its files.

Very truly yours,

L. V. FRAZIER,
*Lt. Col., Corps of Engineers,
District Engineer.*

Inclosure—

Letter from Division Engineer, dated October 8, 1931.

Address reply to The District Engineer, U. S. Engineer Office, P. O. Box 45, Jacksonville, Fla.

111

DEFENDANT'S EXHIBIT D.

Eq. # 53,979.

Filed Aug. 19, 1935. Frank E. Cunningham, Clerk.

United States of America,
War Department.

Washington, September 20, 1934.

I hereby certify that the mimeograph copy entitled "The Intercoastal Waterway, Boston, Mass., to the Rio Grande," and the print attached thereto, was prepared in the office, Chief of Engineers, and is a true copy of the original.

(Signed) E. M. MARKHAM,
*Major General,
Chief of Engineers.*

GM.

I hereby certify that E. M. Markham, who signed the foregoing certificate, is the Chief of Engineers, and that to his certifications such full faith and credit are and ought to be given.

In testimony whereof I, Geo. H. Dern, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 21st day of September, 1934.

[Seal, War Office, United States of America.]

(Signed) GEO. H. DERN,
Secretary of War.

By (Signed) F. M. HOADLEY.

War Department, Form No. 7.

112 The Intracoastal Waterway, Boston, Mass., to the
 Rio Grande.

Between Boston and Long Island Sound no inland routes exist with the exception of the Cape Cod Canal, so that it is necessary to follow the open waters of Boston, Massachusetts, and Cape Cod Bays to the canal.

Cape Cod Canal.

This is a sea-level canal, extending from a point on Cape Cod Bay, about 15 miles southeast of Plymouth Harbor, Mass., to the head of Buzzards Bay, Mass. The canal proper, measured between the shore lines, is 7.6 miles long, with approach channels approximately 0.5 mile long in Cape Cod Bay and 4.5 miles long in Buzzards Bay. The canal has a depth of 22.7 feet at mean low water. The controlling depths in the approach channels are, respectively, 23.8 and 23 feet at mean low water. Three drawbridges cross the canal prism, a railroad bridge and two highway bridges, approximately 0.7 and 5 miles from the westerly end, respectively.

From the canal the route generally followed extends from Buzzards Bay to the Atlantic Ocean, thence through Block Island and Long Island Sounds, and the East River to upper New York Bay, thence through Kill van Kull and Arthur Kill around Great Beds Lighthouse to the entrance of Raritan River, or, via the more open passage through New York lower bay and Raritan Bay to Raritan River. The route follows up that river to New Brunswick, New Jersey, where it enters the Delaware and Raritan Canal.

Delaware and Raritan Canal.

This is a private canal, not under the jurisdiction of the Federal Government. It is leased by the Pennsylvania Railroad and is under the jurisdiction of that company. The main line of the canal extends from New Brunswick, on the Raritan River, to Bordentown, New Jersey, on the Delaware River, a distance of 44 miles. The width of the canal is 80 feet, and it has a navigable depth of 7 feet. There are 13 locks, each with a length of 210 feet, and a width of $23\frac{1}{3}$ feet. Toll is charged for passing through this canal. A survey is now in progress for a sea-level canal, with a minimum depth of 25 feet, from a point near Morgan, New Jersey, on Raritan Bay, to the Delaware River at Bordentown, New Jersey.

From Bordentown, New Jersey, via the Delaware River, to the entrance of the Chesapeake and Delaware Canal, a distance of 62 miles, depths of 12 feet, or greater, obtain.

Chesapeake and Delaware Canal.

This is a sea-level canal, extending from Reedy Point, on the Delaware River about 41 miles below Philadelphia, Pa.,

to the junction of Back Creek and Elk River, about 4 miles west of Chesapeake City, Md., a distance of about 19 miles. The project and controlling depths are 12 feet at mean low water.

113 From its entrance into Chesapeake Bay to Norfolk, Va., ample depths obtain in the bay channels.

Norfolk, Va., to Beaufort Inlet, N. C., Waterway.

This is a sea-level inland waterway generally paralleling the Atlantic Coast, 197.91 miles long; and a lock canal, known as the Dismal Swamp Canal, 25 miles in length, consisting of a sea-level section, 2.6 miles in length, connecting the Southern Branch of Elizabeth River and Deep Creek, and a summit-level section, 22.4 miles in length (extending from Deep Creek, Va., to South Mills, N. C., and controlled by a lock at each of these terminals), connecting Deep Creek and Turners Cut, both of which waterways are sections of the waterway from Norfolk, Va., to the Sounds of North Carolina. The project for the main waterway from Norfolk to Beaufort Inlet provides for a depth of 12 feet at mean low water, with bottom widths of 90 feet in land cuts to 300 feet in open waters; and on the Lake Drummond (Dismal Swamp) canal for a depth of 9 feet over a bottom width of 50 feet. The controlling depth in the main canal is 11.5 feet at mean low water in Virginia Cut, about 800 feet westerly of the Norfolk-Southern Railroad crossing; and in the Dismal Swamp section the controlling depth is about 5.7 feet near the north end of the canal. Navigation is practicable throughout the year on both of the above-mentioned sections.

Inland Waterway, Beaufort to Cape Fear River, N. C., including Waterway to Jacksonville, N. C.

This waterway extends from Beaufort Harbor, N. C., to the Cape Fear River, which it enters about 16 miles below Wilmington, N. C., 93.5 miles long. The project depth for this section of the waterway is 12 feet at mean low water, with a bottom width of 90 feet. This section of waterway is 97 percent completed, but full depths of 12 feet are not yet available, the present controlling depth being about 9 feet at mean low water.

Inland Waterway, Cape Fear River, N. C., to Winyah Bay, S. C.

This waterway extends from the Cape Fear River at Southport, N. C., to Winyah Bay, a total distance of 94.5 miles. The project provides for a depth of 8 feet at mean low water with a bottom width of 75 feet. This project has only recently been started and there is at present no available through channel between the Cape Fear River and Winyah Bay.

The project at present is only about 20 percent completed. A channel has been completed to project dimensions from the Cape Fear River for a distance of 6.4 miles, but no dredging has been done in the next half mile. From this point to Little River, 26 miles, the waterway has been completed except for a distance of about one mile, just west of Shallotte, where rock was encountered and over which the depth is only five feet. No work has yet been done on the portion of the waterway between Little River and Winyah Bay. This necessitates access to open water from a point southwestward of Cape Fear River for about 73 miles to Winyah Bay, S. C.

114 Waterway from Winyah Bay to Charleston, S. C.

This waterway is composed of creeks, sounds, rivers, and bays, and the Estherville-Minim Creek Canal, at a point 8 miles below Georgetown, S. C. The distance from Georgetown on Winyah Bay to Charleston is 74 miles. The route is tidal throughout, and is for the most part sheltered from the sea. This project provides for a channel 4 to 6 feet deep at mean low water and 60 to 70 feet wide on the bottom. The mean tidal range is 3.5 to 5.1 feet, according to locality.

The project, with the exception of the Estherville-Minim Creek Canal, has been completed. Project dimensions obtain in the completed portion, except in Casino Creek, Sewee Bay, Capers Creek, Sullivan Island Narrows, and the Cove, where the width ranges from 60 feet down to 50 feet. The Estherville-Minim Creek Canal, which is about 80 percent completed, has a controlling depth of 5 feet for a width of 50 feet, except in the northerly one-half mile, where the controlling depth is 4 feet for a width of 40 feet.

Under authority of a resolution by the Committee on Rivers and Harbors of the House of Representatives, the

existing project for improvement has recently been reviewed by the Engineer Department, and a recommendation submitted for its modification to provide for a channel 90 feet wide and 10 feet deep, subject to certain conditions of local cooperation. This modification has not yet been adopted by Congress. (R. & H. Com., Doc. No. 11, 72d Congress, 1st session.)

Waterway from Charleston to Beaufort, S. C.

This waterway is comprised of various streams and cuts, and has a total length of about 75 miles. The project provides for a channel 7 feet deep and 75 feet wide from Charleston to Beaufort, S. C. This section is completed with an available depth of 7 feet.

Waterway from Beaufort, S. C., to the St. Johns River, Fla.

This waterway connects Beaufort, S. C., with the St. Johns River, Fla., and offers intermediate connection with Port Royal and Marine Barracks at Parris Island, S. C.; Savannah, Darien, and Brunswick, Ga., and Fernandina, Fla., as well as with the rivers of Georgia which flow into the Atlantic Ocean. It has a total length of approximately 233 miles. The project provides for a depth of 7 feet at mean low water and widths of from 75 to 150 feet. The project is completed. Certain sections of this waterway are subject to considerable shoaling, but dredging at intervals insures project depths at practically all times.

Waterway Jacksonville to Miami, Fla.

This waterway extends from Jacksonville to Miami, following the St. Johns River to the mouth of Pablo Creek, thence via the Florida East Coast Canal, to the northern end of Indian River, Indian River to St. Lucie Inlet, Lake Worth, Hillsboro River, New River and Biscayne Bay, including the artificial connections between these waterways. *The entire waterway is 383 miles in length and in its natural channels the controlling depths were 3 to 7 feet.* The project provides for a channel 8 feet deep and in general 100 feet wide at mean low water. This project was adopted by the river and harbor act of July 3, 1930. Work is now in progress but the present controlling depths at low water vary from 5 to 8 feet in the several sections.

115 In connection with the project for the improvement of the Caloosahatchee River and Lake Okeechobee drainage areas, a navigation channel not less than 6 feet deep by 80 feet width is being constructed from the Intracoastal Waterway in Indian River through St. Lucie River and Canal, along the eastern and southern shores of Lake Okeechobee and thence to Fort Myers on the Caloosahatchee River. From Fort Myers, the project calls for a channel 10 feet deep with a width of 100 feet to Punta Rasa; thence 12 feet deep with a width of 200 feet to the Gulf of Mexico. The controlling depths along the route of the navigation channel are limited to a minimum of 2.5 feet, as only about 9 percent of the improvement has been accomplished. Below Fort Myers, and from Punta Rasa to the Gulf, depths of 9.5 and 11.5 feet, respectively are available. Access from the Atlantic Ocean to the eastern terminus of the waterway may be had through the entrance channel in St. Lucie Inlet, which now has a controlling depth of 5.6 feet.

Waterway across southern Georgia and north Florida to connect the Atlantic Ocean and the Gulf of Mexico.

Under authority of the River and Harbor acts, approved January 21, 1927, and July 3, 1930, investigations of several routes are now in progress by the Department for a proposed waterway across southern Georgia and northern Florida to connect the Atlantic Ocean and the Gulf of Mexico. Upon completion of these investigations, recommendations of the Department will be transmitted to Congress for its consideration.

Waterway from Pensacola Bay, Fla., to Mobile Bay, Ala.

This waterway, when completed, will connect the cities of Pensacola, Fla., and Mobile, Ala., a distance of 64 miles. The project provides for a depth of 9 feet at mean low water and 100 feet bottom width through natural waterways. This project was authorized by the river and harbor act of July 3, 1930, and is at present only partially completed. Work is now in progress.

Waterway from Mobile Bay, Ala., to New Orleans, La.

This waterway, 119 miles in length, lies in the southwestern portion of Alabama, the southern portion of Mississippi

and the southeastern portion of Louisiana, and extends from Mobile Bay through Mississippi Sound, Lake Borgne, the Rigolets, Lake Pontchartrain via the Middle Ground Channel to the 9-foot contour in Lake Pontchartrain, near the end of the Inner Harbor Navigation Canal. The existing project provides for a straight channel 300 feet wide and 10 feet deep from the 10-foot contour in Mobile Bay to the 10-foot contour in Mississippi Sound; thence 9 feet deep and 100 feet wide from the 9-foot contour in Grand Island Pass connecting Lake Borgne with Mississippi Sound, through the Rigolets and Middle Ground Channel in Lake Pontchartrain to the 9-foot contour in Lake Pontchartrain, near the inner end of the Inner Harbor Navigation Canal. The project is practically completed. It provides an inner route between Mobile and New Orleans of the depths stated above.

The major portion of this waterway is subject to very rough weather conditions as it follows along the Gulf Coast. It is difficult and dangerous to navigate this stretch of waterway in a boat without power, or even in a small power boat.

116 Intracoastal Waterway from the Mississippi River at or near New Orleans, La., to Corpus Christi, Tex. (a) New Orleans—Sabine River Section.

This section of the waterway extends from the Mississippi River at or near New Orleans, La., to the Sabine River, La. and Tex. The project provides for channels of 9 feet depth and 100 feet bottom width through the several sections of the waterway and the maintenance of the 5 by 40-foot waterway until completion of the enlarged waterway. On June 30, 1932, the dredging project as a whole was 71.8 percent completed. There are six subdivisions of this section of waterway, known as the Mississippi-Atchafalaya Section, the Plaquemine-Morgan City alternate route, the Atchafalaya-Vermilion Section, the Vermilion-Mermentau Section, the Mermentau-Calcasieu Section, and the Calcasieu-Sabine Section. The total distance from the Mississippi River to Sabine River via the Harvey Canal route is 275 miles, and via the Plaquemine route, 237 miles. There are two available routes from New Orleans to the Atchafalaya River at Morgan City, La., one of which is known as the lower route via the Harvey Canal

and connecting waterways, and the alternate route via the Plaquemine Waterway. The several sections are described as follows:

Mississippi-Atchafalaya Section.

There is an existing waterway five feet deep at mean low Gulf level and 40 feet bottom width from New Orleans, La., to Morgan City, La., a distance of 102 miles, via Harvey Canal and connecting waterways. Harvey Canal connects with the Mississippi River by Harvey Lock at Harvey, La., opposite New Orleans, about $3\frac{1}{2}$ miles above Canal Street. The lock is of concrete construction with steel operating gates. It has an available length of 150 feet, a width of 29 feet, 11 inches, and a depth of 6.5 feet on the sills at mean low water. This lock is now being replaced by a lock 75 feet wide, 425 feet long, and 12 feet depth on the sill at mean low water. This lock will be completed about January 1, 1934. Work on the 9 by 100-foot project from Harvey to Bayou Blue is about 40 percent completed, and from Bayou Blue to the Atchafalaya River about 60 percent completed. The 5 by 40-foot route is crossed by a number of bridges, information concerning which may be procured from the District Engineer, 4400 Dauphine Street, New Orleans, La.

Plaquemine-Morgan City Alternate Route.

This route leaves the Mississippi River at Plaquemine, La., 112 miles above New Orleans, thence via Bayou Plaquemine and connecting waterways 64 miles to Morgan City, La. Bayou Plaquemine connects with the Mississippi River by Plaquemine Lock at Plaquemine, La. This lock is of concrete construction with four sets of steel operating gates and one set of guard gates. It has an available length of 260 feet, width of 55 feet and depth on sill of 10 feet at mean low water. There is an available channel 9 by 100 feet over the upper 17 miles, 9 by 60 feet from mile 17 to mile 21, and 9 by 100 feet over the remaining distance to Morgan City. This route is crossed by three bridges at Plaquemine and Morgan City.

Atchafalaya-Vermilion Section, 66 miles.

Work on this section is about 65 percent completed. There is an available channel 9 by 100 feet from the Atcha-

falaya River to the Southern Pacific Bayou Sale branch crossing at North Bend Plantation, 16 miles, thence to Little Bay a 5 by 40-foot channel will probably be available by November 15, 1932. A 9 by 100-foot channel is now open from Little Bay to Vermilion River, 35 miles.

117 This route is crossed by a single track railroad swing bridge with a horizontal clearance of 75 feet, and a ferry. There is also an available route from the Atchafalaya River to the Vermilion River through Cote Blanche and Vermilion Bays, the limiting draft being about 5 feet. These bays are large open bodies of water connecting with the Gulf of Mexico and are subject to heavy seas during windy weather.

Vermilion-Mermentau Section, 44 miles.

The 9 by 100-foot channel of this section is completed and available to navigation. A salt water guard lock, 1200 feet long, 56 feet wide, with a depth on sill of 12 feet at mean low Gulf, is to be constructed. Pending its completion, an earth dam was constructed across the canal 1.8 miles west of Vermilion River to prevent the inflow of salt water prior to the construction of the lock. This temporary dam will close a portion of the canal until the lock is in operation, about August 1, 1933. The existing 5 by 40-foot route from Vermilion River via Schooner Bayou and North Fork Canal is available for navigation. The North Fork Canal connects with the 9 by 100-foot waterway about 4 miles west of Vermilion River. There are no bridges over this waterway, crossings being provided by three ferries.

Mermentau-Calcasieu Section, 36 miles.

This section is completed to 9 by 100 feet and is open to navigation. The waterway is crossed by a ferry and a highway bridge, the horizontal clearance of the bridge being 56 feet.

Calcasieu-Sabine Section, 27 miles.

This section was completed by the Government to project dimensions in 1925, and enlarged to 30 feet over a bottom width of 125 feet by Calcasieu Parish in 1927. There are no bridges over this section.

(b) Sabine River-Corpus Christi Section.

This section comprises the Sabine River, Sabine-Neches Canal, Port Arthur Canal, Mud and East Bay Bayous, East Galveston Bay to Bolivar Peninsula, Galveston Bay, Galveston Channel to Galveston; thence through Galveston Channel and other waterways to Corpus Christi, Texas. Total length, about 295 miles. The project provides for a channel 9 feet deep at mean low water and 100 feet bottom width, with one foot overdepth in artificial cuts, and 2 feet overdepth in lakes, from Sabine River to Corpus Christi, Texas. This project is only partially completed (about 16 percent on June 30, 1932), and at the present time, the condition of the waterway for navigation is as follows:

Sabine River-Galveston Bay Section.

Dredging of this section is about 70 percent completed. Until completion of this entire section of waterway, passage via the open waters of the Gulf is necessary. It is expected that this section of waterway may be opened to traffic during the latter part of 1933. Between Sabine River and Galveston Bay there are three bridges, one at the location of a proposed highway bascule bridge on the Port Arthur-Sabine Highway, and a movable railroad and a swing highway bridge near High Island, Texas. These bridges will have horizontal clearances of 100 feet.

No construction work has yet been done on the Galveston Bay-Corpus Christi Section. Maintenance, under previous projects, is being continued, the controlling depths in the 5 by 40-foot waterway being as follows:

118 West Galveston Bay-Brazos River Canal.

The ruling depth is about $4\frac{3}{4}$ feet at mean low tide, with a bottom width of 40 feet.

Brazos River-Matagorda Bay Section.

Ruling depth about 5 feet at mean low tide between Freeport Harbor and the eastern end of Matagorda Bay, except for the first 3 miles east of Freeport where $3\frac{1}{4}$ feet is found. From the east end of Matagorda Bay the ruling depth at mean low tide varies from 3 feet for the first $1\frac{1}{2}$

miles to $4\frac{1}{2}$ feet to Dog Island, and from $4\frac{1}{2}$ to 10 feet thence to Port O'Connor. Bottom width, 40 feet.

Pass Cavallo-Aransas Pass.

Ruling depth at mean low tide, on a bottom width of 40 feet, is about $4\frac{3}{4}$ feet, except for about $2\frac{1}{2}$ miles through Mesquite Bay where the depth is about 3 feet on a soft mud bottom.

Aransas Pass-Corpus Christi.

This section of the route follows the 30 by 200-foot channel; the controlling depth being about 27.7 feet.

There are no bridges crossing the waterway between Galveston Bay and Freeport, Texas.

Between Freeport and Corpus Christi, there are four highway swing bridges over the 5 by 40-foot canal, each having a horizontal clearance of 50 feet.

No project has been adopted for the waterway between Corpus Christi and Point Isabel, near the mouth of the Rio Grande. Passage from Corpus Christi to Point Isabel through the open waters of the Gulf is necessary.

Free Navigation.

All waterways under Federal jurisdiction are free, no toll being charged for passage through them. Between Boston and the Rio Grande the Delaware and Raritan Canal is the only stretch of waterway not under Federal jurisdiction. Toll is charged for use of this waterway.

References.

Further detailed information pertaining to the inland waterway along the Atlantic and Gulf Coasts, such as distances, descriptions of waterways, currents, weather conditions, depths and widths of channels, and cities and towns, is contained in two publications issued by the United States Coast and Geodetic Survey, Department of Commerce, known as the "Inside Route Pilot, New York to Key West" and "Key West to the Rio Grande". The cost of these publications is 30 and 50 cents each, respectively. They may be procured from the Director, United States Coast and Geodetic Survey, Department of Commerce, Washington, D. C.

Current information as to controlling depths, tidal influence, status of completion, etc., may also be obtained from the United States District Engineers in charge of the different sections as follows:

119 Cape Cod Canal: 13th Floor, Customhouse, Boston, Mass.

Waters in vicinity of New York City: 710 Army Building, 39 Whitehall Street, New York, N. Y.

Delaware River: Room 1109 Gimbel Building, 35 South 9th Street, Philadelphia, Pa.

Chesapeake and Delaware Canal: Old Federal Building, 6th and King Streets, Wilmington, Del.

Norfolk-Beaufort Inlet Waterway: Foot of Front Street, Norfolk, Va.

Waterways in North Carolina below Beaufort Inlet: 308 Customhouse, Wilmington, N. C.

Waterways in South Carolina, South to Beaufort, S. C.: 33 Customhouse, Charleston, S. C.

Waterways from Beaufort, S. C., to St. Johns River, Fla.: Post Office Building, Savannah, Ga.

Waterways in Florida: 512 Dyal-Upchurch Building, No. 4 East Bay Street, Jacksonville, Fla.

Pensacola Bay-Mobile Bay Waterway: 904 Bell Building, Montgomery, Ala.

Waterway from Mobile Bay to New Orleans, La.: 304 Staples-Powell Building, 80 St. Michael Street, Mobile, Ala.

New Orleans-Sabine River Waterway: 4400 Dauphine Street, New Orleans, La.

Sabine River-Corpus Christi Waterway: Trust Company Building, Galveston, Texas.

Sept. 30, 1932.

Endorsed on cover: District of Columbia Supreme Court. No. 6577. The Miami Beach Jockey Club, Inc., Appellant, vs. George H. Dern as Secretary of War. United States Court of Appeals for the District of Columbia. Filed Oct. 22, 1935. Henry W. Hodges, Clerk.

IN THE

FILED 1 23 - 7 1935

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

JANUARY TERM, 1936.

No. 6577

THE MIAMI BEACH JOCKEY CLUB, INC.,
APPELLANT,

v.

GEORGE H. DERN, as Secretary of War,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLANT.

S. WALLACE DEMPSEY,
Attorney for the Appellant.

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I.

The question involved in this case is whether the State of Florida had the right to sell a portion of its submerged land to plaintiff, to be filled in and put to use, and to thereby add to the wealth and taxable property of the State and the United States. Florida owned these submerged tide lands and had the right to sell them, to be reclaimed, if it could be done without substantial impairment of commerce with foreign nations or among the several States. 24

II.

The Courts have always protected and fostered the right of the several States to reclaim and make valuable and useful submerged lands, which are, in their ordinary state, worthless..... 25

III.

The presumption is that the island would not be an obstruction to commerce with foreign nations or among the several States, and the government, which in this case contends that it is an obstruc-

II.

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tion, was under obligation to prove it, and "the navigability or non-navigability of a stream or lake not large and well-known must be established by clear evidence." (U. S. v. Ladley, 4 F. Supp. 580, 582) 27

IV.

There is no proof that the island would be an unreasonable or any obstruction to commerce with foreign nations and among the several States.... 28

V.

The area north of 79th Street is not and is not regarded or treated by the Federal Government as a part of the bay 34

VI.

The water north of 79th Street was not in its original condition susceptible of use, and was never used for commerce of any kind,—much less for commerce with foreign nations and among the several States 35

VII.

The government has not regarded or treated the site of the island or the adjacent waters or any part of Biscayne Bay or its approaches, except the main channel excavated for that use, as susceptible of being, much less of actually being a highway of interstate or foreign commerce, or needing protection against obstructions to such commerce. On the

III.

PAGE

contrary, the government has by its own acts precluded all of said area north of 79th Street and east of the canal from participating in or affording accommodation for such commerce 36

VIII.

Indeed, the plaintiff,—not the government,—has been damaged by the cutting off by the government through its dumping the material excavated from the channel between it and the channel and the Great City of Miami, to which, but for this dumping, plaintiff's land had access by water. That the dumping was done in connection with the improvement of navigation is no excuse for and does not lessen or palliate the damage suffered through thus isolating plaintiff's land 38

IX.

The part of the intracoastal waterway involved here, with the present improvement completed, making it 8 feet deep by 100 feet wide will not be susceptible of carrying interstate or foreign commerce. Much less will it be a means of transportation of a permanent, useful commerce between the several States or with foreign nations. This is conclusively established by the Act of Congress for its improvement and the reports of the engineers in accordance with which the Act was passed. As the artificial intracoastal waterway, 8 feet deep and 100 feet wide, is not and will not be navigable waters of the United States, clearly, the shallow

IV.

PAGE

water covering the swamp land,—the island site,—
with a controlling depth of one foot to the north of
it, is not and will not be such navigable waters... 40

X.

It has been repeatedly, and again and again,
found by the War Department officials in discharge
of their duties that the filling in of plaintiff's swamp
land will not interfere with present or prospective
commerce, but will aid it, and lessen maintenance
cost.

No opinion to the contrary has ever been ex-
pressed by such an official.

Indeed, the officials have gone farther, and held
that even the artificial Florida East Coast Canal
will carry only local freight, and will never carry
interstate or foreign commerce 43

XI.

The commercial statistics prove that the forecast
of the engineers and the legislative finding by
Congress that the Florida East Coast Canal when
improved would carry only local and not interstate
or foreign commerce to have been correct, and that
the guess of the division engineer who testified on
the trial that the 1925 tonnage came from outside
Florida was wrong 46

XII.

Although certain other parts of the intracoastal
waterway may, through improvement, become a

V.

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highway for interstate and foreign commerce, the improvement will not have that effect on that part of the waterway north of 79th Street in Miami ... 48

XIII.

The first conclusion of law that,—

“Biscayne Bay is a navigable body of water subject to the control of the United States in the interests of navigation; and in its natural state is susceptible of navigation, and of use as a highway for commerce between the states, and has been and is now being so used”,—

Is in conflict with defendant's own evidence 48

XIV.

A misunderstanding of the strict limits of federal control over navigable waters frequently arises, as it does here, from confusing that narrowly confined jurisdiction with the general federal jurisdiction in admiralty 51

XV.

Even if Biscayne Bay and its approaches in their original condition had been used for interstate and foreign commerce, or were susceptible of such use, the right of the United States in the navigable waters within the several States is, however, “limited to the control thereof for the purpose of navigation. * * * Congress * * * may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or

VI.

PAGE

appropriateness to that end. * * * 'This riparian right is property and valuable, and * * *, it cannot be arbitrarily or capriciously destroyed or impaired'." (U. S. v. River Rouge Imp. Co., 269 U. S. 411, 419.) And prohibiting the construction of this island has no real or substantial relation to navigation or appropriateness to that end 52

XVI.

The Government alleges in its answer, that it claims the right to prohibit the filling in of the proposed island under Section 10 of the Act of March 3, 1899 (30 Stat. 1151), Section 403, Title 33 of the Code (Answer Par. 9), but the Secretary of War is not given jurisdiction over the filling in of the proposed island by said section 54

XVII.

The action of the secretary in attempting to revoke the permit was arbitrary and capricious, and was, therefore, and should be held to be void 59

XVIII.

The plaintiff, through obtaining a permit and making very large expenditures on the faith of it, obtained vested rights which the Secretary of War had no jurisdiction to cancel 68

XIX.

This court has authority to grant the injunction sought in this action 71
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**UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA**

No. 6577.

THE MIAMI BEACH JOCKEY CLUB, INC.

APPELLANT,

v.

GEORGE H. DERN, as Secretary of War.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from the final decree of the Supreme Court of the District of Columbia dismissing a complaint brought by Appellant to obtain an injunction against Appellee, the Secretary of War, restraining him from interfering with the filling in of swamp land north of Biscayne Bay, Florida.

No opinion was rendered by Mr. Justice Cox, who presided in the Court below.

The following is a statement of the

FACTS.

1. April 30, 1931, LeGro Properties, Inc., applied to the United States District Engineer for a permit to fill in an island appurtenant to the 79th Street Cause-

way in Biscayne Bay, Florida. The District Engineer recommended that the permit be granted on proof that applicant had secured title to the swamp land involved. The recommendation was approved by the Division Engineer, and the application was approved by the Chief of Engineers under Section 10 of the Rivers and Harbors Act of March 3, 1899. The evidence of title having been submitted, a permit was issued July 1, 1931, containing the following notation,

“(f) That if future operations by the United States require an alteration in * * * the structures * * * herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required * * * to remove or alter the structural work or obstructions caused thereby * * *, so as to render navigation reasonably free, easy, and unobstructed; * * *.”

2. The application was made at the instance of Joseph M. Smoot who desired the island for a race track. Nothing in the papers filed disclosed this.

3. To acquire the swamp underlying the island which Legro Properties had acquired in June 1931 from the Trustees of the Internal Improvement Fund of Florida, Smoot incorporated the Municipal Land Company, the entire stock of which he owned. June 26, 1931, the Municipal Land Company deeded said lands to the Miami Beach Jockey Club, the majority of the stock of which was held by Smoot.

4. The Miami Beach Jockey Club proposed to erect on the island a complete racing plant with a grandstand 75 feet high and other buildings.

5. One month after issuance of the permit, protests against the project were received. August 5, 1931, a petition was filed with the Secretary of War for a public hearing to determine whether the permit should be revoked. The Secretary granted a hearing, which was held September 4 and 5, 1931, and all interested parties were given opportunity to present evidence. The record of the hearing was reviewed by the Chief of Engineers, who, October 1, 1931, made a recommendation that the permit be revoked, which was approved by the Secretary of War. October 5, 1931, the Chief of Engineers instructed the Division Engineer to inform the applicant of the revocation, which notice was given October 8, 1931. The record of the hearing was not introduced in this case.

6. No contract for constructing the island was made, and no construction work was done.

7. The Biscayne Bay waters are tidal. The entire bay is accessible from the ocean. The Bay water varies from 1 to 13 feet in depth, the depth generally being greater south of the main causeway than north of it, and in the vicinity and at the site of the island 4 to 6 feet.

8. Prior to 1895, by Hawk Channel, an inside passage 12 feet deep, from Cape Florida, traffic passed to and from Key West in light sailing boats; that to Key West was transferred there to steamers and went north. In 1894, a considerable amount of tropical fruits and vegetables and other products was shipped from Biscayne Bay and the Keys to the south; 3,985 tons came in. A large fleet of pleasure

vessels used the Bay. Then, the landing place was in or near the mouth of the Miami River. Through the port of Miami in 1899, passed 10,945 passengers, 21,000 tons of freight in vessels of $8\frac{1}{2}$ to $10\frac{1}{2}$ foot draft, which ran from Miami to Key West, Havana, and Nassau. There was commerce then out of Lemon City, 2 miles south of the 79th Street Causeway. The main channel was excavated about 1902 to 18 feet deep, subsequently to 25 feet, and is now being made 30 feet.

9. During 1925, with a railroad embargo, building materials and merchandise from the north was brought by the Intracoastal Waterway, then 5 feet deep by 50 feet wide, and in places but $3\frac{1}{2}$ feet deep, and which passed close to the site of the proposed island, into Miami and vicinity; and there passed through the waterway 703,000 tons, 200,000 tons were shell, and 440,000 tons were rock.

In 1931, 30,000 tons of oil in tankers from the Gulf Coast were transferred to barges and transported through this waterway from Miami to Ft. Lauderdale; and there were 1620 motor vessels of 5 foot draft, and 366 barges northbound, and 1620 motor vessels and 366 barges southbound.

In 1932, 38,529 vessels, 6 to 3 foot draft north, and the same south, tonnage 324,141—28,041 being fishing boats of 66,415 tons, 5 foot draft yachts 10; 4 foot draft, 125; 3 foot draft, 215. Numerous fishing and shrimp boats operate along the Florida ports and go outside to fish. They gather the fish and food there, which come to the shore to be shipped by rail to the

northern markets. Pleasure boats from other States have traversed the waterway.

10. In 1927 Congress authorized the 8 x 100 foot channel through the Bay *as part of the Intracoastal Waterway*. In 1929, the Florida East Coast Canal Company, with a part of the Waterway north of the Bay, transferred its rights to the United States. The Government dredged through to St. John's River. The 8 x 100 canal will be completed shortly.

11. The Intracoastal Waterway, Boston to Rio Grande, has been authorized, of which the channel through Biscayne Bay is a part. The only unimproved portion from Delaware River to Key West is between Charleston and Wilmington, which will be opened this year, producing a continuous waterway from the Delaware to Miami, passing 300 feet from the island site.

12. The District Engineer at Jacksonville reported to the Chief of Engineers in January 1923 that the value of exports in 1925 from territory tributary to the waterway would be \$30,000,000; the tonnage 1,380,000, worth \$70,000,000. This traffic could move over the waterway at a saving.

13. That part of the Bay where the island lies is suitable for hydroplanes and amphibian planes, with which the island would interfere.

14. The contract for dredging the 8 foot canal in the Bay provides that,—the excavated material be deposited on the east or west side of the channel, not less than 1,000 feet from the channel, except where it

is inadvisable, openings through the deposited material to be left at places designated, but not to exceed two per mile. The excavating, dredging and dumping pursuant to the contract is substantially complete. (Pages 17 to 24 inc. of Record.)

It was stipulated by plaintiff and defendant here, (and the stipulation was read into the record) that, the following are the facts herein,

1. Plaintiff is a Florida Corporation, * * *.

2. * * * George H. Dern has since the 4th of March, 1933, been Secretary of War, * * *.

* * *

4. * * * prior to the issuance of the permit * * * Deeds were made * * *,—(1) by the Trustees of the Internal Improvement Fund of Florida to the LeGro Properties, Inc., * * * of the submerged lands involved herein; (2) by the latter of the same lands to the Municipal Land Company * * *; and (3) by the Municipal Land Company of the same lands to plaintiff * * *.

5. Previous to plaintiff's receiving said Deeds, LeGro Properties, Inc., * * * made application to the Secretary of War to * * * fill in said lands, which application was granted on July 1, 1931.

6. August 5, 1931, the Indian Creek Club filed a petition with said Secretary * * * for a public hearing on the question whether said permit should not be revoked. Said Secretary granted such hearing, which was held September 4 and 5, 1931. The petitioner's testimony was in part to the following effect,—

That there will be a deficit of 1,000,000 cubic yards to fill in the island from the area to be dredged. * * *.

The island would be an obstruction in decreasing the navigable water area 5%,—from 19,000,000 to 18,070,000 square yards.

It would cause currents that would be objectionable from a navigational standpoint.

The owner's grant from the State of Florida is voidable, in the opinion of a witness.

Certain residents of the vicinity are inclined to pleasure on the water, own some pleasure boats and the number of them and of fishing boats will increase.

Currents caused by the island would stir up loose material on the bottom, but this would be avoided by constructing the island and depositing it behind the bulkhead.

The *local* traffic of small commercial and fishing vessels should increase as well as that of pleasure yachts, motor boats, sail boats, canoes and rowboats, which is of particular importance.

The landing of hydroplanes and amphibian planes would be interfered with.

The proposed use of the island would increase the vehicular traffic and cause some delay to water traffic.

Many prominent visitors come to Miami, enormous sums have been invested in lands, hotels, clubs and other improvements near and around the shores of the Bay, which interests must be considered and not

sacrificed, and the island would interfere with sail boat races or small boat regattas.

October 2, 1931, said Secretary attempted to revoke, and issued a paper purporting to revoke said permit.

7. The northern part of Biscayne Bay could be reached by water only in one of two ways,—(1) from the north through the Florida East Coast Canal; or (2) from the south through Biscayne Bay from the ocean.

(a.) The northern part of Biscayne Bay is 375 miles from the nearest adjacent State:

“The tonnage,” (of the Florida East Coast Canal), “for the year” (1931) “amounted to 63,788 short tons, * * *. About 33 per cent * * * consisted of rock * * * carried on barges towed by motor boats drawing from 2 to 4 feet for distances not exceeding 30 miles. The balance * * * used portions of the waterway for * * * from 10 to 25 miles and was carried in motor boats and on barges towed by motor boats drawing from 2 to 4½ feet.”

Rpt. of the Chief of Engineers, 1913, part 1, p. 767.

“The freight traffic * * * on a canal down the east coast of Florida will be *local traffic*, in the distribution * * * from the seaports, and the collection * * * at the shipping points. For this traffic a canal of adequate dimensions should form a valuable feeder not only for Jacksonville, but also for Miami Harbor and St. Lucie Inlet * * *. No *through traffic between Jacksonville and St. Lucie Inlet, Miami, or Key West is probable as the ocean route to these ports is not dangerous and much better time can be made on the open sea.*”

H. Doc. 1147, 65th Congress, 2d Session, p. 14.

“* * ultimately such a waterway would be required to afford cheap and rapid transportation for the fruits and vegetables raised so abundantly along the route to the nearest deep seaport, the St. Johns River at and below Jacksonville.”

Id. P. 3.

“* * * an inland waterway will be of immediate benefit to owners of lands along the canal in that it will facilitate shipment of their products to * * * deep water ports * * * on the canal at * * * Maimi, Fort Lauderdale, Palm Beach and Fort Pierce.”

H. Doc. 586, 69th Cong. 2d Session, (i) page 31.

“* * *. A waterway along the east coast of Florida will be used very largely as an inside route for pleasure craft * * *. Although *this traffic will involve very little freight or passenger transportation, and therefore may not be used as a legitimate argument for the appropriation of Federal funds under cover of the interstate commerce clause of the Constitution*, it is a very reasonable justification for expenditure of funds provided by the local communities which derive great profit from the expenditures made by owners and guests traveling on pleasure craft. * * *.”

Id. page 47.

“If commerce should * * * develop * * * to justify * * * these harbors, and if they were provided, it would not decrease the usefulness of the intracoastal waterway. Through shipments between Jacksonville and Miami might decrease but the intracoastal waterway would then be used extensively for local distribution of the greatly increased amount of freight to and from each completed deep-water harbor.”

Id. pages 60, 61.

“* * * a comparison has been made between the total amount of citrus fruit shipped out of Florida during the season ending July 30, 1925 (information furnished by the Florida State Marketing Bureau), and the amount shipped by water during * * * 1925. * * * about 7 per cent was shipped by water, and that more than half of this amount was either consumed in Florida or re-shipped by rail before leaving the State.”

Id. page 63.

“The saving assumed for Dade County,” (which extends about 40 miles north of Miami), “is * * * on the assumption that outgoing fruits and vegetables will move south to Miami and be shipped either by rail or coastwise vessels from there.”

Id. page 71.

8. The water where the island would be is one and one-half miles wide, and varies in that part of the Bay from two to six feet in depth. The island would adjoin on the north the northernmost of the three causeways across the Bay, known as the 79th Street Causeway, which has two openings, one near the westerly end and the other near the easterly end, so that the only navigation to and from the northern part of the Bay is through these two openings. The principal channel passes through the west opening. The island would be 300 feet from this channel and 3000 feet from the east causeway opening.

9. In the development of Miami various areas in and adjacent to Biscayne Bay have been reclaimed by filling.

10. The conditions as to the effect of the construction of plaintiff's said island upon navigation were

the same at the time that said Secretary of War attempted to revoke said permit that they were when he granted the same.

11. Said Secretary of War and said Chief of Engineers, by said attempted revocation of said permit, have asserted and still assert thereby a claim to the right to prohibit the filling in of said land.

12. That the dredging for material to fill in said island will remove silt, mud and other material from a large area of the adjacent parts of the Bay, giving an increased depth.

13. The first project on the Intracoastal Waterway from Jacksonville, Florida to Miami, Florida, adopted by * * * Congress * * * June 15, 1844, (5 Stats. 670) provides for connecting Indian River with Mosquito Lagoon. A project for dredging a channel through Negro Cut to Indian River Inlet was adopted * * * August 18, 1894 (28 Stat. 351), and in the Act of February 26, 1896 (29 Stat. 21), provision was made for opening Jupiter Inlet for the passage of boats and small vessels. A five foot project for Indian River, Florida, was adopted * * * July 13, 1892. (27 Stat. 101.) The existing project adopted * * * January 21, 1927 (44 Stat. 1012), (H. Doc. 586, 69th Cong., 2d Sess.) and the Act of July 3, 1930 (46 Stat. 924) provides for an inland waterway in general 100 feet wide and 8 feet deep at mean low water from Jacksonville to Miami. (*Id.* ps. 34 to 40 inc.)

The following additional facts were proved, viz,—

The Report of the District Engineer, recommending the permit, finds,—

" * * the proposed island will not interfere with the new alignment of the Intracoastal Waterway channel in this section of the Bay. The proposed dredging will afford deeper water and will probably result in the tidal currents flowing more freely in this section of the bay, and it is thought it will tend to reduce the maintenance work of the above waterway in this vicinity. The proposed construction will not interfere with present or prospective commerce."*

" * * No harbor lines have been established at this locality. The proposed construction would undoubtedly influence the future establishment of such lines, but it is believed that lines established to include the proposed island would not be objectionable."*

" * * 1925, the Division Engineer issued a permit * * * to construct * * * four islands in Biscayne Bay * * *. * * * the authority granted thereby expired * * * December, 1928. An application for extension * * * was submitted * * *, but * * * after the date of expiration, and * * * the Chief of Engineers declined to extend * * * but stated that whenever further operations are intended a new application * * * should be made. This present application is submitted accordingly. The islands * * * as authorized by the above permit * * * are shown upon the drawing, Sheet No. 5, accompanying the present application, together with the island and dredging area for which a permit is now requested. It is believed that the island now desired will not be more objectionable than those previously authorized."*

" * * It is recommended that, * * * the permit requested be granted * * *."*

* * * *

*"Office, C. of E., June 23, 1931 * * *."*

*"1. This application is approved under the provisions of Section 10 of the River and Harbor Act of March 3, 1899 * * *."*

“2. The Division Engineer is hereby authorized to issue permit accordingly, upon proper evidence that the applicant has title to the lands involved.”

“By authority of the Secretary of War:

G. B. PILLSBURY,
Brigadier General,
Acting Chief of Engineers.”
(Id. ps. 76 to 82 inc.)

General Lytle Brown, Chief of Engineers, handed down and filed a memorandum of his opinion and decision in attempting to revoke the permit, the material parts of which read as follows,—

“* * * To: The Secretary of War.

1. * * * July 1, 1931, the Division Engineer, * * *, with approval and authorization of this office, issued * * * a permit to construct * * * an island in Biscayne Bay * * *, north of the middle section of the 79th Street Causeway.

2. * * * On August 5, the Indian Creek Golf Club petitioned for a hearing on * * * the advisability of revoking the permit * * *.

3. A public hearing was held * * * September 4 and 5, * * *.

4. I have reviewed the hearings * * * and have examined the proposed project. I am impressed by the following conclusions:

(1) Biscayne Bay is not primarily a commercial port but a winter playground where a very large investment has been made in winter homes.

(2) The upper end of Biscayne Bay has been improved around its borders for home purposes and the adjuncts of these homes.

(3) The proposed island occupies space that is now available for navigation by pleas-

ure boats, which navigation is that which is most suitable to the locality.

(4) The adjacent property owners are, as a rule, opposed to the building of the island, and reasonably so, both from a navigation standpoint and from a standpoint of injury to their property, for the reason that the race track would injure the investment made by them.

(5) It appears to be an extravagant scheme to build a race track at such expense when there are other places where a track can be built more economically and still serve the purpose without injury to private property of great value, and further be more accessible to the public.

5. From the conclusions above given I believe that this permit would not have been granted in the first instance had all conditions surrounding it been known.

6. In view of the foregoing and other facts brought out at the hearing on September 4 and 5, 1931, I am of the opinion that the proposed work will constitute an unreasonable obstruction to navigation. I am therefore obliged to recommend that the permit issued by local engineer authority be revoked. Your approval or disapproval of this recommendation may be indicated below.

LYTLE BROWN,
*Major General,
Chief of Engineers.*

Approved:

F. H. Payne,

Acting Secretary of War."

(*Id.* ps. 40 to 43 inc.)

"The East Coast Canal is a continuous waterway, partly natural and partly artificial, from the St. Johns River to Biscayne Bay. It embraces the chain of shallow salt-water lagoons and creeks

inside the beach ridge and a series of artificial cuts connecting these natural waterways. In addition to the cuts through marsh and high ground much dredging has been done in the natural waterways where the original depth was insufficient. The entire length of the route from the St. Johns River to Miami, on Biscayne Bay, is about 380 miles.” (Doc. 1147, 65th Cong., 2nd Sess., Plffs. Ex. 4.)

“The original requirements as to depth and width of the canal were indefinite, the only provision being that the channel should be of sufficient depth to afford navigation for vessels drawing 3½ feet.” (Id.)

Plaintiff expended in preparations for the construction of the island	\$59,135.46
in cash, and	\$84,970.00
by assuming mortgages,—in all	\$144,105.46.
	(Id. p. 44.)

In addition, Joseph M. Smoot, plaintiff’s president, who had earned as high as \$75,000 per annum, spent two years on this work. (Record 45.) An election was held in Miami and Miami Beach October 21st, 1931 as to whether the Municipalities favored or were adverse to operating a race track on this proposed island. The vote was three to one in favor of the proposition. (Id. ps. 45, 46.)

The material excavated from the 8 foot waterway *by the United States* is piled at the side of the canal so that it comes above the surface of the water. These piles vary in width and height, from 50 to 300 feet in width, and in height from just above the water to 4 or 5 feet above it. This dirt cuts the channel off from all communication by water with all that part of Biscayne Bay to the east of the debris. A row boat may be able

to go over it, but a boat with a draft of two feet would not be able to do so. Even a row boat might be stopped by dirt after it got part way through.

Part of the debris from the canal, (not exceeding 100,000 cubic yards), was dumped on the extreme northwest portion of plaintiff's land and the island has been filled in by Government to that extent.

There were no openings left at all in this dredged material, so that boats might go through. There was nothing at all of that kind, just high and low places. There is a continuous row of dirt along there. It was continuous and there was no opening in it anywhere where boats could get through. It was above the surface of the water all the way through; some was low and some was high. (Id. 46 to 48 inc.) The freight wharf and the wharf for the mooring of vessels at Miami is at the southern side of the old county causeway, the last southern causeway. (Id. 48.)

The shallowest of ocean-going vessels which have navigated or navigate the main channel have a draft of 12 feet, and from that up. There were few as low as 12 feet, and they were mostly small tankers. The others, like the Clyde and Mallory Lines, drew considerably more,—possibly 16 feet. (Id. 48.)

The five irregular islands to the south of the main channel are not inhabited or used. They were filled in by dirt taken from the main channel and are artificial islands. (Id. 49.)

The following islands are artificial, viz.,—Palm, Hibiscus, Star, the five Venetians, part of Normandy

Beach, the two large islands north of Normandy Beach and Biscayne Point. (Id. 49.)

The greater part of the west side of Miami Beach from the Venetian Causeway north,—one-third of Miami Beach,—has been filled in. It was a swamp before. At Sunset Islands there are four islands which have been filled in (Id. 49.)

The 79th Street Causeway was plenty wide enough for the passage of people to and from the race track on the proposed island. In and adjacent to Miami there are a Government and three commercial plane bases. (Id. 54.)

Biscayne Bay north of the 79th Street Causeway has never been used for landing by planes. (Id. 57.)

If this island were filled in it would leave three miles of water north and south, and 3,000 feet between Normandy Beach and the island. The Pan-American Airway station is used for all of the airplane service between Mexico, Central America, South America, and the United States, and is equipped with agents for the Labor and Treasury Departments, the Public Health Service, and all the representatives of the Government having to do with commerce, passengers or freight, between those countries and this Government are represented. That airport is very much used. It is right on water. (Id. 58, 59.) Amphibian planes have not landed anywhere north of the 79th Street Causeway at any time. When they have landed at Miami, they have landed at Chapman Field. (Id. 59, 60.)

These fields and these bases are established for landing; anywhere in the United States where we have stations and fields prepared for landing, the pilots do not select other places, but land at the stations. (Id. 60.)

Up to 1896 no steam vessels had been seen in Biscayne Bay except possibly small yachts. Subsequently the Florida East Coast Railway excavated a 12 foot channel, through which passed in 1899 10,945 passengers and 21,000 tons of freight. (Id. 63.)

Prior to 1895, the only means of transportation by water from Biscayne Bay was in light sailing vessels through Hawk Channel to Key West, where the cargoes were unloaded and reloaded on steamers, on which they were transported North. (Id. 21.)

Permits for docks and similar structures along the shore lines of Biscayne Bay have been issued for years at the rate of one or two a month. (Id. 64.)

Of the 703,000 tons of freight transported on the Intracoastal Waterway in 1925, (as appears from Findings of Fact), 660,000 tons, practically the entire amount, were shell and rock. (Id. 21.) The shell had an average haul of 12 miles; the rock of 8 miles. (Chief of Engineers Report for 1926, part 2, page 627.)

Material from the channel was dumped by the Government 1000 feet from the New Florida East Coast Canal channel, and extended over the corner of the proposed island, on the area of which less than 100,000 yards were dumped. (Id. 67.)

The Report on the Intracoastal Waterway, Boston, Massachusetts, to the Rio Grande, Deft's Ex. D, shows how much of the inland waterway is artificial, and how much is natural. (Id. 69.)

The artificial islands south of the main channel which have been made by the dumping of dredged material are now being increased in size by the dumping of material excavated from the main channel. (Id. 72, 73.)

The material being excavated from the turning basin and from the west end of the main channel is being placed north of the causeway to increase the land, while the material at the east end of the channel is being dumped on the old islands to the south of it. The City of Miami objects to the islands south of the main channel, and has tried to persuade the United States to take them out, and not dump anything more there, in spite of which the Government continues the dumping there. (Id.)

The City wants the land north of the main causeway near the turning basin, for a Fair Grounds, in connection with the South American Exposition grounds. (Id. 73, 74.)

It appears from Sheet (1) of the drawings accompanying the permit, and from the testimony of Col. Hannum, (Id. 67) that the part of the island nearest the new 8 foot channel is 1000 feet distant therefrom.

There was produced from the Ozus rock quarries in Dade County, (in which Miami is situate), 705,000 tons of rock in 1923 and 680,000 tons in 1924. (Page

100, Deft's Ex. C.) There was produced from the stone quarries in St. Lucie County 170,000 tons in 1924, and 142,000 tons in 1923. (Id. 98.)

The existing waterway is not being maintained on dimensions which permit a practicable navigation. (Id. 31.)

APPELLANT ASKS THE COURT TO TAKE JUDICIAL NOTICE OF THE FOLLOWING FACTS, VIZ.,

All of the commerce on the Florida East Coast Canal, (with the exception of 250 tons of rock, valued at \$875, listed as an import, northbound, and as Foreign), for 1925 to 1934, inclusive, was either internal, (intrastate), commerce or local. (Reports of the Chief of Engineers, for 1926, Pt. 2, pages 627-628; for 1927 pages 426, 427; for 1928, pages 475, 476; for 1929, pages 460, 461; for 1930, pages 482, 483; for 1931, page 499; for 1932, pages 503, 504; for 1933, page 471; for 1934, pages 479, 480,

“On the other hand, an advantageous property of calcareous material is the readiness with which it recements itself.”

“Distribution and Amount of Calcareous Rocks.—The calcareous rocks are widely distributed in the State. The vicksburg Limestone, as already stated, is found near the surface over much of central Florida. Oolitic limestones make up an extensive formation running north and south from Miami and forming the east border of the Everglades. Coral and Oolitic limestones form the foundation of the keys from Miami to Key West * * *. Shell, thanks to the oyster industry of the

present and to the shell mound builders of the past, occur in inexhaustible quantities.”

(Bulletin No. 2—Roads and Road Materials,—
Florida State Geological Survey.)

Of all of which this Court has the right to take judicial notice. (Tempel v. U. S., 248 U. S. 121; N. Y. Indians v. U. S., 170 U. S. 1, 32; 7 Ency. of Evid., p. 882, 883, 964, 983; 15 R. C. L. §6, p. 1063; Vol. 5 U. S. Supreme Court Rpts. Digest, §25, p. 3135.)

THE ERRORS RELIED UPON.

Appear in the Assignment of Errors. (*Id.* p. 27 to 30, Inc.) The most important of them are:

(1) The Court erred in admitting evidence,—

(a) As to the use to which plaintiff intended to put the proposed island; (b) as to intrastate or local traffic by Hawk Channel from Miami to Key West, and its unloading and reloading on steamers and being sent North; (c) as to commerce on the Florida East Coast Canal, an artificial waterway; (d) as to the construction of the Intracoastal waterway from Boston to Rio Grande; (e) as to the site of the proposed island being suitable for taking off and landing of hydroplanes and amphibians.

(2). That the Court erred in making the following Conclusions of Law,

(a) That Biscayne Bay is navigable waters of the United States, in its natural state susceptible of navigation and of use as a highway for commerce between

the States, which has been and is now being so used; (b) that the permit for construction of the island was revocable and conferred no vested rights; (c) and that the attempted revocation of the permit by the Secretary of War was in the exercise of lawful judgment and discretion and not arbitrary or capricious.

(3) The Court erred in refusing to find the Conclusions of Law requested by plaintiff, to wit: (a) That the island site is not in navigable waters of the United States; (b) that the attempt of the Secretary of War to prevent the filling in of the proposed island has no real or substantial relation to the control of navigation or appropriateness to that end, and is an arbitrary attempt to destroy plaintiff's rights as the owner of the submerged or swamp land constituting the island site; (c) that the filling in of said island is not prohibited by Sec. 10 of 30 U. S. Statutes, 1151, which is the sole authority the Secretary has for the control of navigable waters; (d) that said island would not create any obstruction to the navigable capacity of the Intracoastal Waterway, and cannot, therefore, be prohibited; (e) that such filling in would not cause unreasonable obstruction to the free navigation of said Intracoastal Waterway, the sole ground for revocation reserved in said permit, and said Secretary had no ground or right to revoke said permit; (f) that, through granting of the said permit, and by plaintiff's making large expenditures and devoting much time and effort towards the construction of said island, plaintiff acquired vested rights to construct the same, and, thereby, both said Secretary and the United States are estopped from interfering with such con-

struction; (g) that the judgment and discretion of said Secretary were completely exercised in his determining, July 1, 1931, that said proposed island would not destroy or seriously interfere with navigation, and it was beyond his power to review or to recall the same; and (h) that the interfering of said Secretary with plaintiff's rights, as owner of said island, to construct said island has inflicted, is inflicting, and will continue to inflict irreparable injury on plaintiff, and plaintiff has no adequate remedy at law therefor. (*Id.* ps. 27 to 30 incl.)

THE STATUTE.

on which the Secretary of War bases his claim to prevent the filling in of plaintiff's swamp land to the surface, and, thereby, making an island, is as follows:

“The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited;

“And it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War;

“And it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized

by the Secretary of War prior to beginning the same.”

(Statute March 3, 1899, C. 425, § 10, 30 Stat. 1151, § 403 U. S. A. Code.)

I.

The question involved in this case is whether the State of Florida had the right to sell a portion of its submerged land to plaintiff, to be filled in and put to use, and to thereby add to the wealth and taxable property of the State and the United States. Florida owned these submerged tide lands and had the right to sell them, to be reclaimed, if it could be done without substantial impairment of commerce with foreign nations or among the several states.

“Upon the admission of California into the Union upon equal footing with the original States, absolute property in and dominion and sovereignty over all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, *so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States*, the regulation of which was vested in the General Government. *Pollard v. Hagen*, 3 How., 212; *Mumford v. Wardwell*, 6 Wall., 436 (73 U. S.,) XVIII., 761.”

Weber v. State Harbor Commissioner, 18 Wall. 57, 71.

“It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of

the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done *without substantial impairment of the interest of the public in the waters*, and subject always to the paramount right of Congress to control their navigation *so far as may be necessary for the regulation of commerce with foreign nations and among the states*. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. Pollard v. Hagen, 44 U. S. 3 How. 212 (11:565); Weber v. Board of State Harbor Comrs., 85 U. S. 18 Wall. 57 (21:798).''

Illinois Central R. Co. v. People of The State of Illinois, 146 U. S. 387-476.

II.

The Courts have always protected and fostered the right of the several states to reclaim and make valuable and useful submerged lands, which are, in their ordinary state, worthless.

“* * * it was not the intention of Congress to interfere with or prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.” (Leovy v. U. S., 177 U. S. 621, 632.)

“The beds and shores of navigable waters are reserved to the states by the Federal Constitution, within the definition of navigable waters. The Daniel Ball, 77 U. S. * * * 557, * * *; Packer v. Bird, 137 U. S. 661, * * *. The reclamation and cultivation of arid land are indispensable to growth and prosperity, and waters for sanitary

and domestic purposes in the centers of population, and for like purposes and agricultural purposes in the rural districts are indispensable to life, health, prosperity, and the public welfare; and these consequences must give heed to legislation for the common good where no substantial injury results.”

Greeson v. Imperial Irr. Dist., 59 F. (2) 529, 532. (C. C. A. 9.)

“* * *. As to lands which are covered and uncovered by the ordinary ebb and flow of the tides, as well as to other lands lying between the shore and the point of navigability, and which are susceptible of reclamation, so as to be devoted to commercial and agricultural purposes, it has always been the custom of the various states to authorize their sale, or to otherwise dispose of them, and such grants, made by authority of the state, have never, so far as we are aware, been held invalid.

* * * * *

“* * * sales may be made of lands situate within navigable waters, or persons may be authorized to fill in or otherwise reclaim such lands, and the same may thereupon become vested in private ownership: *Elizabeth v. Railroad Co.*, 53 N. J. L. 494; *Weber v. Harbor Commrs.*, 18 Wall. 57; *Landon v. Mayor*, 93 N. Y. 148; *Hoboken v. Pennsylvania R. R.*, 124 U. S. 656. * * *. The leading case upon this topic is that of *Shively v. Bowlby*, 152 U. S. 1, to which reference has already been made. * * *. ‘From all this it appears,’ said the court, ‘that when the State of Oregon was admitted into the Union, these lands became its property, and subject to its jurisdiction and disposal; that in the absence of legislation or usage the common-law rule would govern the rights of the upland proprietor, and by that law the title to them is in the state; that the state has the right to dispose of them in such manner as

she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the state to determine for itself; it can say to what extent it will preserve its rights in them or confer them on others.' The opinion rendered in the Supreme Court of the United States quoted this language with apparent approval, and declared that the grant made by the state to lands covered by navigable waters was valid."

People v. Kirk, 53 Am. State Rpts. (162 Illinois, 138), 277, 295, 296, 298, 299.

III.

The presumption is that the island would not be an obstruction to commerce with foreign nations or among the several states, and the Government, which in this case contends that it is an obstruction, was under obligation to prove it, and "the navigability or non-navigability of a stream or lake not large and well-known must be established by clear evidence." (U. S. v. Ladley, 4 F. Supp. 580, 582.)

(a) "Other uses are entirely subject to the rights of navigation, and, *where such uses seriously interfere with or destroy that right*, they must give way to it in any proceeding brought on behalf of the Government, *and the fact*" (*must*) "*be proved that the navigation was injured or destroyed by such uses.*" (Kinney on Irrigation and Water Rights, 2d Ed. §349, p. 578.)

“* * * Whether” (structures are) “a nuisance or not is a question of fact; and where they are confined to the shore, and no positive law or regulation was violated in their erection, *the presumption is that they are not an obstruction, and he who alleges the contrary must prove it* * * *.”

Dutton v. Strong, 66 U. S. p. 1-35.

(b) *The 79th Street Causeway is the southern shore of the land north of it within the commonly accepted meaning of the word “shore”. The Findings recognize this by stating that the island will be “appurtenant” to, that is an adjunct of or addition to the Causeway.*

“The word” (shore) “is also used to express the land near the border of the sea or of a great lake to an indefinite extent, as when we say a town stands on the shore. * * *. Harlan v. Hollingsworth Co. v. Paschall, 5 Del. Ch. 435, 463.”

7 Words & Phrases, ps. 6495, 6496.

IV.

There is no proof that the island would be an unreasonable or any obstruction to commerce with foreign nations and among the several states.

The only proof as to the island being an obstruction is on the two following subjects,—the possible use of the area by amphibian and hydroplanes and for pleasure boats,—neither of which relates to commerce with foreign nations or among the several states, and the evidence, therefore, is incompetent on and irrelevant to the issue, viz.,—

(1) *The proof shows that the water area north of 79th Street never has been used by planes; that there is not the faintest probability that it ever will be used by them, as planes use the fields prepared for them; that the filling in of the island will not substantially, or to a practical extent, diminish its susceptibility for such use; and that there will be ample space for taking off and landing after the island is filled in.*

It was shown that the area north of 79th Street has never been used for landing or taking off of planes; there would be 3 miles of water north and south, and 5,000 feet east and west left with the island filled in; these planes may land at the Pan-American Airway Station, used for airplane service between this country and Central and South America, being on the water and very much used, or at the Municipal or Old Pan-American Airport; these planes do land at Chapman Field; these prepared fields are used for all landing and takings off; anywhere in the United States where there are stations and fields prepared for landing, aviators land at them and not at other places. (Rec. ps. 58 to 60 inc.)

(2) *Even if the island site and the adjacent water area were susceptible of use by planes for taking off and landing, (and that these waters are not susceptible of such use is clearly established by the fact that they never have been so used, and that prepared fields are used everywhere they exist, and there is an abundance of them in Miami), and the filling of the island made such use impossible, (and it does not, as there will be an abundance of space left), this would not make the island an obstruction to commerce with foreign Nations or among the States.*

The Government's contention as to planes is that every State body of water long enough and wide enough for the taking off and landing of planes is thereby made navigable waters of the United States, and that the submerged or swamp lands under such waters cannot be reclaimed, and, this, although there is not, as the evidence here conclusively proves, the faintest probability that such water will ever be used by planes. Quite aside from the great extension of Federal jurisdiction involved in holding that shallow State waters, incapable of carrying interstate or foreign commerce, become Federal waters because there is a bare possibility that planes might land and take off there, the Government's contention goes much farther and claims Federal jurisdiction if planes can land on any water, although they never have landed there, and it is practically certain that they never will because there are an abundance of fields in the immediate vicinity at which planes always land. Such we contend is not the law.

Moreover, it is the commerce clause of the Constitution which supports Federal jurisdiction. Commerce has always been defined and understood to be the transportation of freight, and planes are not, and it will be a long time before they will be freight carriers, if ever they are able to overcome the excessive cost of such transportation.

(3) *The only commerce other than planes to which it is claimed the island would be any obstruction is that of pleasure boats, for which the Chief of Engineers says that the island site is "most suitable", and this is not interstate or foreign commerce.*

The evidence on the hearing for revocation was that,—

(a) The island would be an obstruction in decreasing the navigable water area 5%,—from 19,000,000 to 18,070,000 square yards; (b) certain vicinity residents are inclined to pleasure on the water, own some pleasure boats, and the number of them and of the fishing boats will increase; (c) the *local* traffic of small commercial and fishing vessels should increase as well as that of pleasure yachts, motor boats, sail boats, canoes and rowboats, *which is of particular importance*; (d) the landing of hydroplanes and amphibians would be interfered with; (e) the island would increase vehicular traffic, and cause some delay to water traffic; (f) many prominent visitors come to Miami, and enormous sums have been invested in lands, hotels, clubs, and other improvements near and around the shores of the bay, which interests must be considered and not sacrificed; and (g) the island would interfere with sail boat races or small boat regattas. (Par. 6 Stipulation of Facts, p. 35.)

It was further shown that,—

1.) Biscayne Bay is not primarily a commercial port, but a Winter playground, * * *; (2) the upper end of Biscayne Bay has been improved around its borders for home purposes; (3) the island occupies space now available for navigation by pleasure boats, which navigation is that which is most suitable for the locality; (4) the adjacent property owners are * * * opposed to * * * the island, both from a navigation standpoint and from * * * injury to their property,

for * * * the race track would injure the investment made by them; and (5) it appears * * * an extravagant scheme to build a race track at such expense when there are other places where a track can be built more economically, and still serve the purpose without injury to private property of great value, and further be more accessible to the public.

(Opinion of Chief of Engineers handed down on attempted revocation, approved by the Acting Secretary of War pages 41 to 43 inc.)

“To meet the test of navigability as understood in the American Law, a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. *A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient.* While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. *Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation.*”

U. S. v. Doughton, 62 F. (2d) 936, 939.

2.) As Congress has provided for the construction of the Florida East Coast Canal with the prescribed dimension of 100 feet wide and 8 feet deep, it is presumed that the water outside its channel is not navigable, and there was no proof that it is navigable. All the proof is to the contrary.

“The Act of March 26, 1868 (Stats. 1867-68 p. 335) declared that there should be a navigable canal in the middle of Channel Street which was to be 140 feet wide. If Channel Street was laid off to be 200 feet in width, which plaintiff alleged, but did not prove, the courses and distances given in the plaintiff’s description would bring the strips in controversy outside and northerly of this 140 foot channel, and presumptively they would not be in navigable water.”

People *ex rel.* Board of State Harbor Comrs.
v. Southern Pac. Co. (S. F. 7385), 1 Supreme Ct. of Cal. (Feb. 18, 1918) 171 P. 294;
177 Cal. 555.

3.) It has been held in a strikingly similar case that marsh or tide lands similar to those involved here were not navigable waters.

“A tract of marsh or tide lands largely submerged at flood tide was intersected by tidal sloughs, one of which was a mile, more or less, in length, and in its lower reaches as wide as 100 feet or more, with a depth of from 2 feet or less at low tide in its shallowest parts to approximately 7 or 8 feet at its flood, and deepening somewhat towards its mouth. It had never been used or regarded as navigable, other than for duck boats or punts for hunting or fishing, until within a few years, when an oil company established a plant on adjoining land, and on a few occasions took power boats and scows of light draft up the channel on

the flood tide, and it was impracticable to put the channel to such use without deepening it for the purpose. Held, that the stream was not a 'navigable' stream."

North American Dredging Co. of Nevada v. Mintzer, 245 Fed. (C. C. A. 9), p. 297.

V.

The area north of 79th Street is not and is not regarded or treated by the Federal Government as a part of the bay.

(a) *This area is not within the Dictionary or the legal definition of a bay or a part of a bay. These definitions are the following,—*

(1) "Bay * * * an indentation in the shoreline of a body of water; the water between two projecting headlands; sometimes, an arm of the sea connecting with the ocean." (Funk & Wagnalls New Standard Dictionary);

(2) A bay is "an opening into the land where the water is shut in on all sides except at the entrance", (U. S. v. Morel, 26 Fed. cases 1310, 1313, No. 15,807).

So it would not include water 4 miles away, shut off by three causeways, but includes only the water adjacent to the entrance.

(b) *The Government does not regard or treat this area as a part of the bay.*

(1) The Government entitled Defts. Ex. B as "Miami Harbor and Approaches". The area north of 79th Street is "an approach", being the only approach

or method of approach from the north; (2) The Intracoastal waterway is a project adopted by Congress, traverses the area north of 79th Street, and is separate and distinct from the Bay; (3) the Chief of Engineers in every annual report states separately the tonnages of Miami Harbor, and of the Intracoastal Waterway; and (4) this area is cut off from the Bay by three separate causeways.

VI.

The water north of 79th Street was not in its original condition susceptible of use, and was never used for commerce of any kind,—much less for commerce with foreign nations and among the several states.

(1) The burden was on the Government to prove (Point III above), that the area was susceptible of carrying interstate or foreign commerce, but the Government offered no proof, except as to its susceptibility for use by planes and small pleasure boats.

(2) Plaintiff proved that this area “was no more, in fact, than a drain for a swamp”, and “was not a highway or in its natural state capable of becoming a highway of interstate or foreign commerce” (U. S. v. Doughton, 62 F. (2d) 940).

“The” (Florida) “East Coast Canal is a continuous waterway, partly natural and partly artificial, from the St. Johns River to Biscayne Bay. It embraces the chain of shallow salt-water lagoons and creeks inside the beach ridge and series of artificial cuts connecting these natural waterways. In addition to the cuts through marsh and high ground much dredging has been done in the natural waterways where the original depth was insuf-

ficient. The entire length of the route from the St. Johns River to Miami, on Biscayne Bay, is about 380 miles." (Doc. 1147, 65th Cong., 2nd Sess., Plffs. Ex. 4.) (See also Defts. Ex. B.)

VII.

The Government has not regarded or treated the site of the island or the adjacent waters or any part of Biscayne Bay or its approaches, except the main channel excavated for that use, as susceptible of being, much less of actually being a highway of interstate or foreign commerce, or needing protection against obstructions to such commerce. On the contrary, the Government has by its own acts precluded all of said area north of 79th Street and east of the Canal from participating in or affording accommodation for such commerce.

(1) The only passage for commerce to or from the area north of 79th Street is the Intracoastal Waterway, and the Government has shut that part of the area east of the channel, including the island site, off from the waterway by a strip of land 50 to 300 feet wide which it has filled in with material it dug from the channel to heights varying from the surface of the water to five feet above it. So, by the Government's deliberate act it has cut the site of the island and all the area east of this Government made land off from any possibility of commerce with foreign Nations or among the States, or, indeed, from any commerce whatsoever, for, while there is the old opening for the waterway at the east end of the causeway, the depth there a little north of the causeway is only one (1) foot for a

long distance (Defts. Ex. B), and will doubtless grow less as there will be no future maintainance of the old channel.

(2) The Government has throughout the period of its improvement of the channel at Miami, since 1896,—for forty (40) years,—filled in submerged land whenever it has deepened the main channel, and has permitted others to fill in land throughout the Bay and its approaches, thus proving by its own acts, and its acquiescence in the acts of many others,—(and “Acts speak louder than words”),—that it has never regarded and does not regard such filling in as creating an obstruction to foreign or interstate commerce.

(3) A glance at the map, Defts. Ex. B, shows that Biscayne Bay and its approaches are dotted with artificial islands, filled in from submerged lands, as follows:—9 on the south side of the main channel, made of material excavated from the main channel, and being added to by excavations now being made by the Government, despite the protests of the City of Miami, contrasted markedly with the three to one approval of our island; the greater part of the west side of Miami Beach from the Venetian Causeway north,—one-third of Miami Beach,—has been filled in, and was a swamp before; and the following islands are artificial, viz, the four Sunset Islands, the five Venetians, Palm, Hybiscus, part of Normandy Beach, the two large islands north of Normandy Beach and Biscayne Point.

(4) The Government is now filling in land on the north side of the Main Channel, where it will restrict the interstate commerce which it has brought into ex-

istence through excavating that channel, and the land which it is making is to be occupied as the South American Exposition Grounds,—for public entertainment—in the same way the island here is to be made useful, and to furnish entertainment for many thousands of people.

(5) The State of Florida, and the Federal Government have both treated the island site as non-navigable waters. Such treatment is highly significant in determining the character of the waters.

“The fact that certain waters have been treated as non-navigable both by the Secretary of the Interior and by the Courts of the State in cases involving the correctness of meander lines is not *without significance in determining* their character as navigable or non-navigable.”

U. S. v. Oregon, 79 U. S. L. Ed. 573.

VIII.

Indeed, the plaintiff,—not the Government,—has been damaged by the cutting off by the Government through its dumping the material excavated from the channel between it and the channel and the Great City of Miami, to which, but for this dumping, plaintiff's land had access by water. That the dumping was done in connection with the improvement of navigation, is no excuse for and does not lessen or palliate the damage suffered through thus isolating plaintiff's land.

It is to be remembered that the Chief of Engineers has certified that (1) “Biscayne Bay is not primarily a commercial port, but a Winter playground; and, (2), *the proposed island * * * space * * * is now available*

for navigation by pleasure boats, which navigation is that which is most suitable to the locality."

And the evidence on the hearing on which the Chief of Engineers attempted to revoke the permit, was that,—“the local traffic of small commercial and fishing vessels should increase as well as that of pleasure boats, motor boats, sail boats, canoes and rowboats, *which is of particular importance*”.

The point was made also on the hearing that sail boat races and small boat regattas should not be interfered with, which the Government made land precludes. From the use of row-boats and motor-boats from his land to the City and to the Intracoastal channel plaintiff has been cut off for all time by the Government's main land,

“A private pass way and ford appurtenant to land situated in Kentucky upon a creek tributary to the Cumberland river cannot be destroyed, to the damage of the land, without compensation to the owner, by the backwater resulting from the construction and maintenance by the Federal Government, in aid of navigation, of a lock and dam upon that river in Kentucky, whereby the level of such river along certain stretches is raised so as to render it, to the extent of the raising, an artificial canal instead of a natural waterway.”

U. S. v. Cress, 243 U. S. 316.

(See also the multitude of authorities cited under 7 Roses Notes, pages 550, 560 Incl.)

(1) Plaintiff is a riparian owner.

“The only thing necessary to entitle him to the right of a riparian proprietor is to show that the body of land owned by him borders upon a

stream.” (7 Words & Phrases, 6243-4; Jones v. Conn., 64 Pac. 855, 858; 54 L. R. A. 630; 87 Am. St. Rep. 634.)

IX.

The part of the intracoastal waterway involved here, with the present improvement completed, making it 8 feet deep by 100 feet wide will not be susceptible of carrying interstate or foreign commerce. Much less will it be a means of transportation of a permanent, useful commerce between the several states with foreign nations. This is conclusively established by the act of Congress for its improvement and the reports of the Engineers in accordance with which the act was passed. As the artificial intracoastal waterway, 8 feet deep and 100 feet wide, is not and will not be navigable waters of the United States, clearly, the shallow water covering the swamp land—The island site,—with a controlling depth of one foot to the north of it, is not and will not be such navigable waters.

(a) *The Engineers reported, as they were required by law to do, that all commerce on the Florida East Coast Canal would be local or intrastate.*

The provision requiring the Engineers to report as to present and prospective commerce is as follows:

“* * * every report submitted to Congress, in addition to *full information regarding present and prospective commercial importance of the project covered by the report*, and the benefit to commerce likely to result from any proposed plan of improvement, shall also contain such data as it may be practicable to secure in regard to the following, (enumerated), subjects: * * *.”

Title 33 USCA, § 545, pp. 503, 504.

(b) Under Par. No. 7 of the Stipulated Facts, (Record pp. 36 to 38 inc.), there are set out, abstracts from the reports of the Army Engineers, all of which show that commerce of the Florida East Coast Canal was, none of it, to be through traffic, and that it will all be local.

(c) Congress adopted the Florida East Coast Canal "in accordance with H. Doc. 586, 69th Cong., 2nd Sess.," which repeatedly declared that the commerce would be local and not interstate or foreign. This constituted a most persuasive, if not conclusive legislative finding.

"True, great weight will be given to the legislative finding where the facts are doubtful, and the legislative finding will not be disturbed upon doubtful evidence; * * *. (Scott v. McCreary, 148 Ky. 791, 797.)

"* * * it was the undoubted right and duty of the legislature to ascertain the population of Berkeley before acting upon the proposed charter. This the legislature did, and in the preamble to the resolution ratifying the charter it recited and proclaimed the fact that the town of Berkeley contained a population of more than 10,000 inhabitants. This resolution with the charter which it established is a law of the state, and is conclusive as to the fact so recited in the preamble. (*Ex Parte Fedderwitz*, 62 pp. 935, 936-7, (Cal.).)

"But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect."

Block v. Hirsh, 256 U. S. 135, 154.

"Act April 3, 1798, authorizing the city of New York to lay out regular streets according to a plan agreed on, having been passed on the petition of the corporation, and containing a preamble referring to, and in part reciting, the petition, the

petition and the preamble can be resorted to to ascertain the legislative intention,—*Furman v. City of New York*, 7 N. Y. Super. Ct. (5 Sandf.) 16.”

Vol. 44 Am. Dig. § 287, p. 2842.

“It has always been common to adopt in one statute by reference certain provisions of another statute. There has never been any serious question as to the validity of such legislation, or as to its effectiveness to accomplish the intent of the legislature. It is also not uncommon to adopt a code or general revision of statutes in the same manner. An instance of such an adopting act is as follows: “That the code of laws prepared under its authority by (giving the names) and revised, fully examined and identified by the certificate of its joint committee, and recommended and reported for adoption, and with the acts passed by the general assembly of 1895 added thereto by the codifiers, be, and the same is, hereby adopted and made of force as the Code of Georgia.” It is held that in form and substance such an act is valid and effective to enact and make of force the code or revision referred to, that such code or revisions need not be read as prescribed in the constitution for bills, that a title to the adopting act is sufficient though it may not express the subject of the code or revision, and that it is not obnoxious to the provision of the constitution against revising or amending an act by reference to its title only.”

Sutherland on Statutory Construction, (2d Ed.), Vol. 1, § 76, p. 124.

X.

It has been repeatedly, and again and again, found by the War Department officials in discharge of their duties that the filling in of plaintiff's swamp land will not interfere with present or prospective commerce, but will aid it, and lessen maintenance cost.

No opinion to the contrary has ever been expressed by such an official.

Indeed, the officials have gone farther, and held that even the artificial Florida East Coast Canal will carry only local freight, and will never carry interstate or foreign commerce.

1. September 11, 1925, the United States Division Engineer issued a permit for the filling in of the swamp lands which are proposed to be filled in for the proposed island, which must have contained a statement that such filling in would not interfere with present or prospective commerce, and would not have been issued if such had not been the opinion of the Engineers. (Rec. 79.)

2. This application expired December 31, 1928. An application for its extension was made after the time limited was past. The extension was denied, but the Chief of Engineers stated that whenever further operations were intended a new application for a permit should be made. (*Id.* 79.)

3. July 1, 1931, a permit was granted to fill in plaintiff's swamp land, and to construct the island involved here, containing the statement that,—“the proposed construction will not interfere with present or prospective commerce.” (*Id.* 77 to 82 incl.)

4. The Engineers reported to the 65th Congress, 2d Sess., by H. Doc. 1147 that "the freight traffic to be anticipated on a canal down the East Coast of Florida will be local traffic.

5. Again, the Engineers reported to the 69th Congress by H. Doc. 586 that "a waterway along the East Coast of Florida will be used very largely as an interstate route for pleasure craft, * * * *this traffic will involve very little freight or passenger transportation, and, therefore, may not be used as a legitimate argument for appropriation of Federal funds under cover of the Interstate Commerce Clause of the Constitution, * * *.*"

6. The 69th Congress adopted the Florida East Coast Canal "in accordance with H. Doc. 586", and thereby Congress legislatively declared and found that the traffic even on the artificial Florida East Coast Canal would be wholly local.

7. Colonel Hannum, the United States Division Engineer for the Jacksonville District, was called by the Government as its expert witness on the trial. He not alone failed to express an opinion that even the artificial Florida East Coast Canal would carry interstate or foreign commerce; he went further and admitted that the statements made by the Engineers in said H. Docs. 1147 and 586 that the traffic on this canal would be wholly local were correct. (*Id.* pp. 70 to 72 incl.)

Colonel Hannum guessed that the greater portion of the 703,000 tons of freight transported on the canal in 1925 came from outside the State, but it developed that 660,000 tons,—nearly the entire amount, were

shell and rock, (*Id.* 21), and the shell had an average haul of 12 miles, and the rock of 8 miles. (The Chief of Engnrs. Rpt. for 1926, Pt. II, p. 627.)

8. And even the Conclusions of Law made by the Court is only that Biscayne Bay is a navigable body of water, subject to control of the United States, and it is shown by Point IV hereof that the shallow water covering the swamp lands North of the Third or 79th Street Causeway, and miles from the Bay, is not a part of the Bay, and is not treated or regarded as such by the War Department or the Army Engineers. (Point V above.)

9. In the opinion handed down by the Chief of Engineers and approved by the Secretary of War in attempting to revoke the permit, it was held that,—“(3) The proposed island occupies space that is now available for navigation by pleasure boats, which navigation is that which is most suitable to the locality.” (Rec. p. 43.)

10. On the hearing, preliminary to the attempted revocation, with the complete evidence in the hands of the Government, the only part introduced as to navigability over swamp lands constituting the island was,—“(1) Certain residents of the vicinity are inclined to pleasure on the water, own some pleasure boats and the number of them and of the fishing boats will increase; (2) *the local traffic of small commercial and fishing vessels should increase as well as that of pleasure yachts, motor boats, sail boats, canoes and row-boats, which is of particular importance;* and (3) the landing of hydroplanes and amphibian planes would be interfered with;” (Rec. 35).

Finally, after these 10 solemn declarations covering a period of years and made whenever the occasion arose, the Government clinched this multitude of binding official declarations by its act in filling in the continuous line of swamp land from the 79th Street Causeway North, shutting off the site of the island from all communication with the East Coast Canal, the artificial waterway, and the only navigable water North of the Causeway, and even filled in part of plaintiff's island, demonstrating by this action that all of these many declarations were correct and true and that the water over the swamp land of the island site was not navigable for interstate or foreign commerce, and that the kind of navigation available was not of sufficient importance to be even considered as against convenience in dumping the material excavated from the canal.

XI.

The commercial statistics prove that the forecast of the Engineers and the Legislative finding by Congress that the Florida East Coast Canal when improved would carry only local and not interstate or foreign commerce to have been correct, and that the guess of the Division Engineer who testified on the trial that the 1925 tonnage came from outside Florida was wrong.

(a) The tonnage of the canal for 1931 was 63,788 tons, 33% rock carried distances not exceeding 30 miles, and the balance carried 10 to 25 miles. (Par. 7-a Stipulation of Facts.)

(b) In 1925 all the freight was either domestic or local; 703,531 tons were carried altogether, of which

440,000 tons were rock, the average haul of which was 8 miles, and 200,000 tons were shell, the average haul of which was 12 miles,—leaving only 63,531 tons carried various other distances, but none of it as much as 380 miles, which it would have to be carried from Miami to reach another State. (Part II, Chief of Engineers' Report for 1926, pp. 627, 628.)

(c) The traffic statistics by the Chief of Engineers for the years from 1926 to 1934, inclusive,—for nine years,—show that all the commerce on the canal was local or domestic, excepting one shipment of 250 tons of rock valued at \$875.

While this small shipment of rock is listed as not being local or domestic, it is obvious that all that is meant by listing it otherwise is that it came from another stream than the canal: Certainly, it would not be profitable to carry 250 tons of rock, worth only \$875, 380 miles, which it would have to come if from another State; nor would it be practical or economical to carry rock valued at \$875 that distance in the slow way necessary in a canal; Florida has an abundance of rock near at hand, and it would be neither practical nor economical to import it a distance of 380 miles; and this is but one shipment, small in tonnage,—but one load for an ordinary canal boat or barge, and of trifling value, in nine years. This one shipment did not make the canal navigable waters of the United States.

North Am. Dredging Co. v. Meritzen, 245 F.
297;

U. S. v. Doughton, 62 F. (2), 936;

U. S. v. Oregon, 79 L. Ed. p. 573.

XII.

Although certain other parts of the Intracoastal Waterway may, through improvement, become a highway for interstate and foreign commerce, the improvement will not have that effect on that part of the Waterway north of 79th Street in Miami.

The Doughton case proceeds on the theory that the Intracoastal Waterway at the point involved there had become, through improvement, a highway for interstate and foreign commerce, but the question there as to its being such a highway was very different from the same question here, for there State lines are near together, and the ocean, particularly in the Cape Hatteras area, especially dangerous; while here, the part of the Intracoastal Waterway involved is 380 miles from the nearest State line, and, as the Engineers have reported,—“No through traffic” (even) “between Jacksonville and St. Lucie Inlet, Miami, or Key West is probable, as the ocean route to these ports is not dangerous, and much better time can be made on the open sea.” (Record, p. 36.)

XIII.

The first Conclusion of Law that,—

“Biscayne Bay is a navigable body of water subject to the control of the United States in the interests of navigation; and in its natural state is susceptible of navigation, and of use as a highway for commerce between the states, and has been and is now being so used”,—

Is in conflict with defendant's own evidence.

Defendant proved that, in 1895, the commerce from Biscayne Bay for the North went South in light draft sailing vessels to Key West, where it was unloaded and reloaded on steamers, in which it went North. (*Id.* p. 62.) Colonel Hannum quoted Doc. 662, 56th Cong. p. 6, dated May 6, 1900, as follows,—

“Briefly, at a place where, up to 1896, no steam vessel had been seen, except possibly small yachts, a port has been created to and from which sail the vessels mentioned above, and through which there passed in * * * 1899, 10,945 passengers and 21,000 tons of freight.” (*Id.* p. 63.)

“A large dock was built on the west shore of the bay, about three-quarters of a mile above the mouth of the river; a 12-foot channel has been provided from this dock to the sea via the Cape Florida entrance; and the products of the vicinity of the main land and of the neighboring keys formerly sent to Key West for shipment north are now shipped by rail from Miami direct.” (*Id.* pp. 62, 63.)

This channel across the bay passed through waters originally four and three feet in depth. (Rec. 64.)

(1) So, Biscayne Bay, in its natural state, without artificial improvement, served simply as a waterway, (as the Army Engineers repeatedly described such a stream), for “local traffic in the distribution from the seaports and the collection at the shipping points”: for collection in the bay and in the Keys to the south of it and transportation in light sailing vessels to Key West, unloading there, and reloading on steamers for shipment from there. There was no *continuous* shipment made or possible from the bay to any other State or foreign country, but only the gathering of the products of the Bay, and taking them to Key West, 150

miles distant, for shipment. This did not make the bay navigable waters of the United States or the shipments therefrom interstate or foreign shipments.

“A body of water wholly within the boundaries of a single state or one which is navigable only within a state, and one which cannot be visited by vessels coming from or going to, *by continuous voyages*, navigable waters of other states, is not a navigable body of the United States, and is not within the jurisdiction of Congress. Wherever in its course the stream ceases to be navigable for commerce between states, its national character as public waters of the United States terminates, and above that point it is within the exclusive jurisdiction of the state within which the stream flows.”

§348, Kinney on Irrigation and Water Rights (2d Ed.), pp. 575-6.

“If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State.
* * *.”

U. S. v. The Montello, 11 Wall. 411-423.

“Whenever in its course the stream ceases to be navigable for commerce between states, its national character as public waters of the United States terminates, and above that point it is within the exclusive jurisdiction of the state within which the stream flows.” (§348, Kinney on Irrigation and Water Rights (2d Ed.), pp. 575-6.)

“The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a *continuous channel* for com-

merce among the States or with foreign countries.”

Escanaba, Etc., Trans. Co. v. Chicago, 107 U. S. 678; 27 L. Ed. 442, 444.

(2) The conclusion of law in question was merely a deduction from the evidence and this Court has the right to draw its own deductions from the evidence.

“Being merely a deduction, this court is at liberty to draw its own deductions and base its decree on its own view.”

Merchants' Warehouse Co. v. U. S., 44 F. (2d) 379, 390; *Jackson v. U. S.*, 230 U. S. p. 1.

XIV.

A misunderstanding of the strict limits of Federal control over navigable waters frequently arises, as it does here, from confusing that narrowly confined jurisdiction with the General Federal Jurisdiction in Admiralty.

“Appellants, to support their view that the Franicovich Canal is not a navigable water, to which the admiralty and maritime jurisdiction extends, rely on *Gulf & I. R. Co. v. Davis* (D. C.) 26 F. (2d) 930; *Id.* (C. C. A.) 31 F. (2d) 109; *United States v. Doughton* (C. C. A.) 62 F. (2d) 936; *Leovy v. United States*, 177 U. S. 621, 20 S. Ct. 797, 44 L. Ed. 914; *United States v. President, etc., of Jamaica* (C. C. A.) 204 F. 759. These cases are concerned not with admiralty and maritime jurisdiction, but with the power of Congress over public waters susceptible of being used as highways for interstate or foreign commerce. The argument that they measure the limits of admiralty jurisdiction ‘is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not

limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in article 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.'

"Mr. Justice Clifford, in *The Belfast*, 7 Wall. 624, 640, 19 L. Ed. 266, said: 'Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants.'"

The Lucky Lindy, 76 F. (2d) 561, 563.

XV.

Even if Biscayne Bay and its approaches in their original condition had been used for interstate and foreign commerce, or were susceptible of such use, the right of the United States in the navigable waters within the several states is, however, "limited to the control thereof for the purpose of navigation. * * * Congress * * * may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. * * * 'This riparian right is property and valuable, and * * *, it cannot be arbitrarily or capriciously destroyed or impaired'." (*U. S. v. River Rouge Imp. Co.*, 269 U. S. 411, 419). And prohibiting the construction of this island has no real or substantial relation to navigation or appropriateness to that end.

As shown above, and by the evidence, the Government has cut off the entire area, including the island

site, from and has precluded any navigation in all this area. So, the attempt to control the island site has “no real or substantial relation to the control of navigation or appropriateness to that end”; and it, (the Government), cannot, as it is attempting here to do, arbitrarily and capriciously destroy plaintiff’s property by preventing plaintiff from filling it in and making it valuable and useful.

“*The right of the United States in the navigable waters within the several states is, however, ‘limited to the control thereof for the purposes of navigation.’* Seattle v. Oregon & W. R. Co. 255 U. S. 56, 63, 65 L. ed. 500, 506, 41 Sup. Ct. Rep. 237. And while Congress, in the exercise of this power, *may adopt*, in its judgment, any means *having some positive relation to the control of navigation* and not otherwise inconsistent with the Constitution, United States v. Chandler-Dunbar Water Power Co. 229 U. S. 62, 57 L. ed. 1075, 33 Sup. Ct. Rep. 667, *it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation*, or appropriateness to that end. In Yates v. Milwaukee, 10 Wall. 504, 19 L. ed. 986, it was said in reference to the right of a riparian owner on a navigable stream: ‘This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.’ This language was cited with approval in Illinois C. R. Co. v. Illinois, 146 U. S. 445, 36 L. ed. 1039, 13 Sup. Ct. Rep. 110.”

U. S. v. River Rouge Imp. Co., 269 U. S. 411, 419.

“It does not follow that the courts would be justified in sustaining any proceeding by the At-

torney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation *substantially interferes* with the navigable capacity within the limits where navigation is a recognized fact.”

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 703.

XVI.

The Government alleges in its answer, that it claims the right to prohibit the filling in of the proposed island under Section 10 of the Act of March 3, 1899, (30 Stat. 1151), Section 403, Title 33 of the Code. (Answer Par. 9), but the Secretary of War is not given jurisdiction over the filling in of the proposed island by said section.

(a) “* * * *there is no common law of the United States which prohibits obstructions and nuisances in navigable waters, or which would sustain a bill in equity for abatement; that such obstructions and nuisances * * * are not offenses against United States laws, unless such laws are found on its statute books.*” (United States v. Brazoria County Drainage Dist. No. 3, 2 F. (2d) 861, citing *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, and *United States v. Rio Grande Irr. Co.*, 174 U. S. 690.)

(b) *The Secretary of War is not given jurisdiction over the filling in of the proposed island by Section 403.*

(c) *The Section reads as follows,—*

“The creation of any obstruction not affirmatively authorized by Congress, to the navigable

capacity of any of the waters of the United States is hereby prohibited;

“And it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War;

“And it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.”

(d) *The first subdivision of the Statute does not prohibit the filling of the island because,—*

(1) The prohibition is general, and as canals are dealt with specially in the third subdivision, and the only possible means of conveyance of freight from or to the northern part of Biscayne Bay is through the Intracoastal Canal (which, therefore, constitutes all that can be claimed to be waters of the United States), the general provision in the first subdivision gives way to and is superceded by the special provision in the third subdivision.

“General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.”

Ginsberg & Sons v. Popkin, 285 U. S., p. 208.

(2) An obstruction to "Navigable capacity" only is prohibited, and the proposed island would not in any degree impair but to the extent that the refuse and dirt would be removed from the adjacent land, and the depth increased would increase and improve such capacity.

"Capacity of a canal is a well-understood term in engineering and means the volume of water that it is capable of conveying, estimated on width, depth, and grade. Wyatt v. Larimer & W. Irr. Co., 29 Pac. 906, 913, 1 Colo. App. 480."

Vol. 1, Words & Phrases, p. 953.

(e) *The second subdivision "makes it unlawful to build any structures in waters of the United States". The words of a statute are to be read in their natural and ordinary sense. (Miller v. Robertson, 266 U. S. 243, 250.) To build means, "1. To form, construct or erect, as a dwelling, a ship, etc." (Funk & Wagnalls Practical Standard Dictionary), and a structure is,—"1. That which is constructed, a combination or resulted parts, as a building or machine." (Id.)*

So reading the words used in "their natural and ordinary sense", "filling in an island cannot be included" under a prohibition of "building structures".

Moreover, which is conclusive, Congress itself distinguishes the one act from the other by prohibiting "building structures" in the second section of the act, and forbidding "filling in" in the third section: If "building structures" included "filling in an island" it would have been futile and meaningless to provide separately and elaborately against both, as was done.

In addition, "building structures" is permitted provided "the plans have been recommended by the Chief of Engineers and authorized by the Secretary of War", and this has been done here; and while it may be urged that if the attempted revocation was valid, it carried with it by implication a revocation of such approval and authorization, revocations by implication are not favored (25 R. C. L. § 168, p. 917), and regardless of whether the revocation is valid, the plans are separate and distinct and depend on themselves, and not on the permit.

"The creation of any such obstruction may be enjoined, according to the last provision of the section, by proper proceedings in equity under the direction of the Attorney General of the United States, and it was in pursuance of this clause that these proceedings were commenced. Of course, when such proceedings are instituted it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether *such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact.*"

U. S. v. Rio Grande Dam & I. Co., 174 U. S. p. 708, 709; 43 L. Ed. p. 1136, 1143, 1144.

"* * * with the permission of the state and of the United States, these parties had each built constructions in navigable waters which, *because of this consent*, were lawful constructions, *notwithstanding navigation was thereby, to some extent, impeded.* The consent of the United States simply meant that it, as guardian of navigable waters, would not interfere."

U. S. v. Pa. Salt Mfg. Co., 16 F. (2d) 476, 480; Affd. 30 F. (2d) 332.

“Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases.”

Dutton v. Strong, 17 L. Ed. p. 29, 32; 66 U. S. p. 1, 35.

“The normal power of the Secretary of War under Sec. 10 of the Act of March 3, 1899, is to maintain the navigable capacity,” (in the case cited), “of Lake Michigan” (and here all Florida East Coast Canal), “* * *,” “* * * merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary’s authority. He could not make some local sanitation the basis for a continuing diversion,” (as here he could not make the basis of his opinion the use of the waters over the swamp land for pleasure craft, such as rowboats; or the fact that there are handsome homes on the main land or on Miami Beach; or his opinion that plaintiff was not making a good investment in filling in the island,—all questions to be solved by the locality and by plaintiff. (Wisconsin v. Illinois, 278 U. S. 433 to 435, incl.)

(f) *The third subdivision does not apply because the only part of it in point here is that which makes it unlawful to “fill a canal” and there is no proposal to fill in the canal.*

The third paragraph does not apply because the water North of 79th Street is not a Port, (6 Words & Phrases, p. 54); or a roadstead, (7 *Id.* 6257); or a Haven, (6 *Id.* 3220); or a Harbor, (4 *Id.* 3214); or a Lake, (5 *Id.* 3974); or a Harbor of Refuge, (4 *Id.* 3214); or an Inclosure within the limits of any break-water or of the channel or any navigable water of the United States.

The only waterway to which reference is made in this third section which is involved here is a canal,—the Florida East Coast Canal,—and filling in the island would not involve “excavating or filling in, or in any manner altering or modifying the course, location, condition, or capacity of this canal.”

This construction of the Section is in accord with *Gleason Coal Co. v. U. S.*, 30 F. (2d) p. 22, (C. C. A. 6); 14 F. (2d) 233.

XVII.

The action of the secretary in attempting to revoke the permit was arbitrary and capricious, and was, therefore, and should be held to be void.

(a) *The Secretary found, June 23, 1931, the following,—*

“The proposed dredging will afford deeper water and will probably result in the tidal currents flowing more freely in this section of the bay, and it is thought it will tend to reduce the maintenance work of the above waterway in this vicinity. The proposed construction will not interfere with present or prospective commerce.”

(b) *The conditions as to the effect of construction of plaintiff's said island upon navigation were the*

same when the Secretary attempted to revoke said permit that they were when he granted it. (No. 10 of Stip. Facts.)

(c) It was stipulated that the testimony on the hearing to revoke was in part as set out in the stipulated facts, none of which was relevant or material to the question whether the island would obstruct interstate or foreign navigation.

The evidence was,—that the area to be dredged would not supply the filling material needed; that the island would decrease the water area from 19,000,000 to 18,070,000 square yards, and would cause objectionable currents; a witness thought the owners grant from Florida voidable; vicinity residents are inclined to pleasure on the water, own pleasure boats, the number of which and the fishing boats will increase; currents caused would stir up loose material, which would be avoided by depositing it behind the island bulkhead; the local traffic of small commercial and fishing vessels, pleasure yachts, motor boats, sail boats, canoes and row boats, which is of particular importance, should increase; landing of amphibian and hydroplanes would be interfered with; the proposed use of the island would increase vehicular traffic, and cause some delay to water traffic; many prominent visitors come to Miami, enormous sums have been invested in lots, hotels, clubs and other improvements near and around the shores of the Bay, which interests must be considered and not sacrificed; and the island would interfere with sail boat races or small boat regattas.

(d) It is to be assumed that the Government selected, for the Stipulation of Facts, the evidence it

deemed most favorable to it, but as the stipulated evidence was incompetent, immaterial and trivial, and proves clearly that the attempted revocation was without competent evidence to justify it, and as the Government had the complete evidence, and could have introduced it, its failure to do so raises the presumption that the complete evidence would have been more unfavorable than the stipulated abstracts therefrom.

“The failure, unexplained, to produce evidence which is in the possession of a party, raises a presumption that, if produced, it would not be favorable to the contention of the party possessing it. Kirby v. Tallmage, 160 U. S. 379 * * *; Graves v. United States, 150 U. S. 120, * * *; Runkle v. Burnham, 153 U. S. 216, 225, * * *.”

The Bolton Castle, 250 Fed. 403, 406. (C. C. A. 5.)

“And we take it that the rule is well settled that, when proof of circumstances is produced tending to support the contention of the party upon whom rests the general burden of proof, and the other party is so situated that he can offer evidence and all the facts and circumstances as they existed, and can show, if such be the truth, that the circumstances relied on can be accounted for consistently with his contention, and such other party fails to offer such proof, the court is justified in concluding that the proof, if offered, instead of rebutting, would sustain the case against him.”

Henderson v. Richardson Co., 25 F. (2d) 225, 228. (C. C. A. 4.)

(e) *The Chief of Engineers handed down an opinion, (stating the reasons for his attempted revocation), which was approved by the Secretary. This opinion also shows that the attempted revocation was based wholly on local questions over which the Secretary had*

no jurisdiction and had no relation to the control of interstate or foreign navigation or to the question whether the island would be an unreasonable obstruction thereto.

The opinion recites,—

“1. * * * July 1, 1931, the Division Engineer, * * *, with approval and authorization of this office, issued * * * a permit to construct * * * an island in Biscayne Bay * * *, north of the middle section of the 79th Street Causeway.

2. * * * On August 5, the Indian Creek Golf Club petitioned for a hearing on * * * the advisability of revoking the permit * * *.

3. A public hearing was held * * * September 4 and 5, * * *.

4. I have reviewed the hearings * * * and have examined the proposed project. I am impressed by the following conclusions:

- (1) Biscayne Bay is not primarily a commercial port but a winter playground * * *.
- (2) The upper end of Biscayne Bay has been improved around its borders for home purposes * * *.
- (3) The proposed island occupies space * * * now available for navigation by pleasure boats, which navigation is that which is most suitable to the locality.
- (4) The adjacent property owners are * * * opposed to the building of the island, * * *, both from a navigation standpoint and from * * * injury to their property, for * * * the race track would injure the investment made by them.
- (5) It appears * * * an extravagant scheme to build a race track at such expense when there are other places where a track can be built more economically and still serve

the purpose without injury to private property of great value, and further be more accessible to the public.

6. In view of the foregoing and other facts brought out at the hearing * * *, I am of the opinion that the proposed work will constitute an unreasonable obstruction to navigation * * *."

(f) *The Government cannot rely on the reference in (6) above, to "other facts brought out at the hearing"*.

The stipulated facts established at the hearing are set out under (c) of this Point above. No stipulated fact even tends to prove that the island would be an obstruction to interstate or foreign commerce, but, on the contrary, does show that the only proof was of alleged strictly local objections, and the failure of the Government to introduce the full hearing raises the conclusive presumption that they would have been even more unfavorable to it. (*Henderson v. Richardson Co., Supra.*) Besides reference in this wholesale way to the evidence cannot be had to eke out the findings of fact, (*Kendrick & Co. v. Com., 29 F. (2), 559, 564*).

"Ordinarily, findings of fact cannot be aided by extrinsic facts or papers."

64 C. J. §1098, p. 1250.

"A special finding of facts should declare all the ultimate facts determining the issues and essential to support the judgment. It should be complete in itself, unaided by reference to bill of exceptions, * * *."

Corliss v. Pulaski County, 116 F. (C. C. A. 7), p. 289.

(g) Moreover, the conclusion of the Chief of Engineers and the Secretary that "the proposed work would constitute an unreasonable obstruction to navigation" is both immaterial and unimportant, because the kind of navigation which he refers to is strictly local by pleasure boats, which the opinion says is "most suitable to the locality."

(h) The jurisdiction of the Secretary to revoke has long been construed by him; is stated at the head of every permit he issues; and is limited to requiring the removal of structures which he has authorized after they have proved to be an "unreasonable obstruction to the free navigation of said waters, * * *."

Here, the island had not been filled in, much less found, (after being filled in), an unreasonable obstruction to navigation. Circumstances had not arisen which justified revocation. On the contrary, it is stipulated that conditions were the same as when the permit was granted. Then the Secretary found that the island would be no obstruction to present or future commerce, but a valuable aid thereto in increasing the stream capacity and in lessening the maintenance required.

(i) The Secretary had no jurisdiction to take into account, (as he did, by approving it), the matters stated in the opinion of the Chief of Engineers to be the basis of his action.

"In passing upon the question whether or not permission shall be given for the erection of a dolphin off the coast of Santa Barbara, Cal., the Chief of Engineers and the Secretary of the Treasury should not consider the incidental injury to

the bathing beach or the impairment of bathing facilities in that vicinity, or any other similar reason not having direct relation to the navigable capacity of the waters and their use for interstate and foreign commerce. Such consideration should not prevent the approval of the plan, provided it would otherwise have their approval.

“Congress has no power, either directly or through an agent, to require or prohibit the doing of any act upon the navigable waters of the United States unless such act may affect interstate or foreign commerce.”

Vol. 27 Opinions of Attorneys General. (1908-1909.) p. 284, 285.

(j) *As the Secretary based his attempted revocation wholly on irrelevant testimony, his attempted revocation is void.*

“Injunction. Granted. Held, That a Construction the Secretary Had Placed upon Railway Grant Legislation Was Erroneous; That the Erroneous Construction Had Caused Him to Base a Finding of Fact Entirely upon Irrelevant Testimony, and That He Had Exceeded His Powers under the Law in Making Such Testimony the Sole Basis of His Decision.”

Sec. 390, Loughran on Judicial Review of Federal Executive Action, p. 286, 287, 288; Santa Fe Pacific R. Co. v. Fall, 259 U. S. 197.

“Where an executive officer, under his misconception of the law, has acted without or beyond the powers given him, the courts have jurisdiction to restore the status *quo ante* insofar as that may be done.”

U. S. v. Mott, 37 F. (2d) 860, 862. (C. C. A. 10.)

“It is true that, even if discretion be vested in an executive or administrative official, he may not exercise such power in any arbitrary manner. His actions must be justified by the law. If he acts beyond or outside of the law, or fails or refuses to comply with the plain provisions thereof, his acts become arbitrary, and mandamus will issue to correct them.”

Hines v. Welch, 57 App. D. C. 371, 374.

(k) *The issuing of the permit involved the judgment or discretion of the Chief of Engineers, and the Secretary of War. It was completely exercised when the permit was granted, and there was no change in conditions between the granting of the permit and the attempted revocation. The attempted revocation was therefore void.*

“When the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him. (Following United States *ex rel.* West v. Hitchcock, 19 App. D. C. 333, and Farfield v. United States *ex rel.* Frost, ante, 165.)”

Garfield v. U. S. *ex rel.* Goldsby, 30 D. C. Appeals, p. 177.

(l) *The attempt to revoke the permit will be invalidated because it works a discrimination against the plaintiff, for no lawful reason, as compared with the United States itself, and all of the various other persons who have filled in the Bay and its approaches with islands, even along the main channel and North of the 79th Street Causeway.*

“* * * although a regulation may be lawful on its face and apparently fair in its terms, yet if it is enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power will be invalidated by the courts. *Yick Wo v. Hopkins*, 118 U. S. 356, * * *; *Dobbins v. Los Angeles*, 195 U. S. 223, * * *.”

D. J. Dunigan, Inc. v. Dist. of Col., 59 App. D. C. p. 384, 386.

“The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.”

Dobbins v. Los Angeles, 195 U. S. 223, 236.

“In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the 14th Amendment to the Federal Constitution.”

Id. p. 241.

“Having induced the defendants, by repeatedly *recognizing* the validity of the Bright title, and by finally confirming it by the act of 1865, to alter their position by investing their money in that title, the state cannot now, in fairness, allow or assert its invalidity.

“Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason in morals or law, that will exempt them from the doctrine of estoppel.

Com. v. Andre, 3 Pick. 224; Com. v. Pejepsut Proprietors, 10 Mass. 155; People v. Soc. for Prop. of Gosp. 2 Paine, 545; State v. Bailey, 19 Inc. 452; People v. Maynard, 15 Mich. 463; Cahn v. Barnes, 5 Fed. Rep. 326.

“Demurrer to special answer overruled.”

State of Indiana v. Milk, 11 Fed. Rep. p. 389, 397.

XVIII.

The plaintiff, through obtaining a permit and making very large expenditures on the faith of it, obtained vested rights which the Secretary of War had no jurisdiction to cancel.

(a) From 1925 down to October 1931, the Secretary of War and the Chief of Engineers found that the proposed island would be no obstruction but a decided help to navigation. In reliance on the permit and on this long adopted attitude of the Secretary, plaintiff expended in cash and incurred obligations to the amount of \$140,000, and its president, a man whose time was extremely valuable, spent two years in the effort to develop the island. It is stipulated that there was no change in conditions between the time of the granting of the permit and the attempt to revoke it. Since the attempted revocation, the Government has made any navigation over the island site or in the area east of the Intracoastal Waterway impossible by cutting off all this area by a ridge of land made by piling the excavations from the channel. Under such circumstances, the Government is estopped from preventing the plaintiff from filling in the island.

“In action by the government to recover possession of a strip of submerged land in a harbor,

used for pier purposes, evidence that defendant dock company, before commencing the construction of a concrete dock on the strip, made application to the War Department for permission to encroach upon the harbor line at points indicated on a map accompanying the application, which showed the proposed construction, and that the government, although thereby fully informed of the proposed construction, made no objection, and made no claim to the property, but stood by while the defendant made large expenditures for the concrete dock, *held* material to the question of abandonment by the government of the strip, and, in connection with other evidence, to support finding of such abandonment.”

U. S. v. Pennsylvania & Lake Erie Dock Co.,
272 F., p. 839, 840.

“When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors * * *.

“* * *. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the government. * * * The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in proper case, where he invokes judicial action.”

U. S. v. Edison Electric Illuminating Co., 37
F. (2d) 926, 928.

“It is true, as plaintiff contends, that when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. *Walker v. United States* (C. C.) 139 F. 409; *Cook v. United States*,

91 U. S. 389, 23 L. Ed. 237; *United States v. Flint*, 25 Fed. Cas. P. 1107, No. 15,121. The Acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority.”

Ritter v. United States, 28 F. (2d) 265, 267.

(C. C. A. 3.)

“* * * with the permission of the state and of the United States, these parties had each built constructions in navigable waters which, because of this consent, were lawful constructions, notwithstanding navigation was thereby, to some extent, impeded. The consent of the United States simply meant that it, as guardian of navigable waters, would not interfere. The consent of the state meant that, and more. So far as the construction was above low-water mark, it meant simply what the consent of the United States meant; but, so far as it was below low-water mark, it meant also that the riparian owner might build upon the lands of the state, and so far use them.”

U. S. v. Pa. Salt Mfg. Co., 16 F. (2d) 476, 480; *affd.* 30 F. (2d) 332.

“The Supreme Court, when the case reached it, putting aside all other questions, held that the state was estopped by its own conduct from asserting a claim so injurious to the defendant, and in emphatic language rejected the bill as having no foundation in equity, justice, or good conscience.”

State of Michigan v. Jackson, L. & S. R. Co., 69 Fed. p. 116, 123, 124. (C. C. A. 6.) Taft, Lurton and Severens presiding.

“* * * the revocation of a license after the licensor has stood by and permitted the licensee to incur a considerable expense on the faith of the

license would amount to a constructive fraud, working an estoppel in the licensee's favor."

(Shaw v. Profitt, Ann. Cas. 1913A, 63, 70.)

(b) The only navigation of any kind asserted by the defendant, and that, as has been repeatedly shown, is local and not interstate or foreign, is through the artificial canal, and while the Government has needed but a small part of plaintiff's land on which to dump its debris, it had no right to even take that small part or to interfere with the remainder of plaintiff's land for the benefit of and to improve its artificial waterway, except on paying the reasonable value of what it takes.

"As a riparian owner, appellant had the right to enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means, and *no public easement beyond the natural one can arise without grant or dedication, save by condemnation with appropriate compensation for the private right.* United States v. Cress, 243 U. S. 316, 321, 37 S. Ct. 380, 385, 61 L. Ed. 746."

Jacobs v. U. S., 45 F. (2d) 34, 37.

XIX.

This Court has authority to grant the injunction sought in this action.

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431, 64 L. ed. 641, 646, * * *."

Colorado v. Toll, 268 U. S. 228, 230.

“The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of appellees.”

Lane v. Watts, 234 U. S. 525, 540.

CONCLUSION.

The Findings of Fact and Conclusions of Law are utterly insufficient to sustain the judgment.

(a) The Findings of Fact are absolutely barren of any Finding whatsoever that the shallow or swamp waters over the island site are navigable at all and much less that they are navigable waters of the United States. On the contrary, Finding 14 is that the site has been cut off from the East Coast Canal, the only water North of the 79th Street Causeway navigable even for local purposes, leaving the island site usable only for small craft, such as rowboats, in a very, very small area,—3000 feet wide by three or four miles long. (Rec. ps. 23, 24.)

(b) The only Findings as to navigability are as to the East Coast Canal, an artificial waterway. These Findings are immaterial and irrelevant: All that is material is whether the swamp waters over the island site were navigable in interstate or foreign commerce in their *original or natural condition*. (U. S. v. Dough-ton, 62 F. (2d) 936, 939 incl.).

(c) Even if the swamp waters involved were navigable, proof that this is so would be insufficient to sustain the judgment: It would be necessary to prove that filling in the island would seriously interfere with

or destroy navigation. Such proof is wholly lacking. Much less is there any Finding to this effect. (U. S. River Rouge Imp. Co., 269 U. S. 411, 419; U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 703; Kinney on Irrigation & Water Rights, (2d Ed.) §349, p. 578.)

(d) On the contrary, the Government has on 10 separate occasions declared through its officials that filling in the island would not interfere with present or prospective commerce, and has clinched these repeated declarations by its action in filling in a ridge of land, including a part of plaintiff's island, so as to cut off the island site from the East Coast Canal, the only means of even local navigation, except for boats with a one-foot draft in an area 3000 feet wide by three or four miles long. (*Supra*, Point X.)

(e) Likewise, the only Conclusion of Law as to navigation that Biscayne Bay is a navigable body of water, in its *natural state susceptible of navigation, and of use as a highway for commerce between the States, and has been and is now being so used*, is (1), *contrary to the evidence*, in that defendant itself proved that the Bay waters in their natural state were used only for local transportation to Key West, where the sailing vessels used were unloaded and the cargoes reloaded on steamers for interstate shipments. (§ 348, Kinney on Irr. & Water Rights, (2d Ed.) ps. 575-6; U. S. v. The Montello, 11 Wall. 411-423; Escanaba, Etc. Trans. Co. v. Chicago, 107 U. S. 678), and

(2) The water North of the 79th Street Causeway, including that over the proposed island, is not a part of the Bay either under the definitions of a Bay, or as treated by the United States. (*Supra*, Point V.)

(f) There is no Conclusion of Law whatsoever as to the navigability of the waters North of the 79th Street Causeway.

Lastly, plaintiff was induced, by the declarations of the Federal officials, through a long period of years, that the proposed island would not in any way interfere with present or prospective commerce, and by its acts in granting permits over a long period of years, to expend a huge sum of money, and devote a long period of time to preparing to construct the proposed island, and it would be inequitable and unjust, under such circumstances, for the Government to now interfere with the filling in of this swamp land, which would add to the wealth of Miami, of Florida, and of the United States.

“Having induced the defendants, by repeatedly recognizing the validity of the Bright title, and by finally confirming it by the act of 1865, to alter their position by investing their money in that title, the state cannot now, in fairness, allow or assert its invalidity.

“Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel.”

State of Indiana v. Milk, 11 Fed. p. 389, 397.

All of which is respectfully submitted.

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JAN 20 1936

Henry W. Hodges

CLERK

No. 6577

**In the United States Court of Appeals
for the District of Columbia**

OCTOBER TERM 1935

THE MIAMI BEACH JOCKEY CLUB, INC., APPELLANT

v.

GEORGE H. DERN, AS SECRETARY OF WAR, APPELLEE

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT

This appeal is from a decree of the Supreme Court of the District of Columbia, dismissing after hearing, appellant's bill of complaint whereby it sought a decree setting aside the action of the Secretary of War in revoking a permit issued to LeGro Properties, Inc., for the construction of an island in Biscayne Bay, Florida. The bill also prayed an injunction restraining the said Secretary from interfering with the construction of said proposed island by appellant.

(1)

THE FACTS**Proceedings before the War Department**

Upon application of the LeGro Properties, Inc., a Florida corporation, a permit dated July 1, 1931, was issued by the authority of the Secretary of War, for the construction of an island in Biscayne Bay, Florida, in accordance with plans shown on drawings accompanying said application. This permit was issued under the provisions of Section 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1151; 33 U. S. Code, Sec. 403, which prohibited creation of obstructions or building of structures in navigable waters of the United States, unless authorized by the Secretary of War (Findings of Fact, Par. I, R. 17).

In making the application and receiving the permit, the LeGro Properties, Inc., was acting in the interest of Joseph M. Smoot, who desired to construct the island for a site for a race track. A few days prior to the issuance of the permit, LeGro Properties, Inc. transferred the land underlying the site of the proposed island, which it had acquired from the State of Florida, to the Municipal Land Company, a corporation organized and owned by Smoot as a conduit for passing the title to the appellant, Miami Beach Jockey Club, the majority of whose stock was owned by Smoot. The Municipal, on the same day it took title from LeGro, transferred to Miami Beach Jockey Club (Findings of Fact, Pars. II and III, R. 19).

Shortly after the issuance of the permit to LeGro Properties, Inc., protests against the project were filed with the Secretary of War, and in consequence, he granted a hearing to determine whether the permit should be revoked. That hearing was held at Miami, Florida, on September 4 and 5, 1931, and all parties in interest were afforded an opportunity to present evidence.

The record on said hearing was reviewed by the Chief of Engineers who, on October 1, 1931, reported to the Secretary of War, recommending that the permit be revoked. That recommendation was approved by the Acting Secretary of War and the permittee was notified that the permit had been revoked (Findings of Fact, Par. V, R. 20).

No contract for the construction of the proposed island was ever entered into and no construction work has been done (Findings of Fact, Par. VI. R. 20).

Proceedings in court

To the bill of complaint the then defendants filed answer, a trial was had at which evidence was presented by the parties, and at the conclusion thereof the Court announced a finding for defendant. Findings of Fact and Conclusions of law were filed (R. 17-24), and a decree dismissing the bill was entered June 26, 1935 (R. 27). From that decree this appeal was taken (R. 27).

The statute involved

Section 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1151, 33 U. S. Code 403, is as follows:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

QUESTIONS PRESENTED

While numerous assignments of error are specified by appellant (R. 27-30), there are, in our view of the case, but two real questions involved, namely, (1) Is Biscayne Bay a navigable body of

water and (2) Was there authority and power in the Secretary of War to revoke the permit.

In support of the decree below, we assert the following:

Propositions

1. Biscayne Bay is a navigable body of water, subject to the jurisdiction of the Secretary of War in the interest of navigation.

2. The Secretary of War had the power and authority to revoke the permit issued to LeGro Properties, Inc., and his action in so doing, is not subject to review in the Court, especially where the record of the hearings upon which he determined to revoke, is not before the Court.

ARGUMENT

Biscayne Bay is a navigable body of water, subject to the jurisdiction of the Secretary of War in the interest of navigation

The determination of whether a body of water is navigable must be arrived at under the rule many times stated by the Supreme Court of the United States. It is set forth in *U. S. v. Holt State Bank*, 270 U. S. 49, thus, p. 56:

The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary

condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels, or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. *The Montello*, 20 Wall. 430, 439; *United States v. Cress*, 243 U. S. 316, 323; *Economy Light & Power Co. v. United States*, 256 U. S. 113, 121; *Oklahoma v. Texas*, 258 U. S. 574, 586; *Brewer-Elliott Oil & Gas Co. v. United States*, *supra*, p. 86.

In the light of this settled rule, it would seem to require but consideration of the map of “Miami Harbor and approaches” (Defts’ Ex. B), to convince that Biscayne Bay is navigable. That map shows mean low water depths from thirteen feet to one foot. In addition there is testimony of Colonel Hannum that the waters of that Bay “are tidal all the way from the extreme north end, all the way throughout the whole complete map, all this water [indicating]. This bay is accessible from the ocean” (R. 61). See also Findings of Fact, Par. VII, R. 20, 21. His further testimony (R. 62, 63) summarized in Findings of Fact, Par. VIII, R. 21, establishes that commerce has been for more than forty years carried on in the Bay to

and from points without the State of Florida in vessels of eight to ten feet draft.

But appellant contends that the question of navigability for this case must be limited to the particular area where the proposed island was to be constructed. We say that there is no foundation for such a contention either in law or in logic.

As was said in *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 263:

When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed. In *Scranton v. Wheeler*, supra, the water was very shallow between the high land and the pier erected in the river by authority of Congress, and which it was contended cut off access to navigability.

And this is amplified by the decision laying down the rule that navigability is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor because the navigation is not open at all seasons of the year or at all stages of the water. *The Montello*, 20 Wall. 430, 439-441; *Economy Light Co. v. U. S.*, 256 U. S. 113, 121; *U. S. v. Utah*, 283 U. S. 64, 86; *Arizona v. California*, 283 U. S. 423, 453, 454.

Again, it is not essential to establish navigability to show that commerce has been had on or over the

water in question. If the stream or body of water be capable in its natural state of being used for purposes of commerce, it is navigable in fact. *The Montello*, supra, p. 441; *Oklahoma v. Texas*, 258 U. S. 574, 586; *Economy Light Co. v. U. S.*, supra; *U. S. v. Utah*, supra, p. 82, 83.

But even if appellant's conception of the principle of law applicable here were correct, the situation would not be altered because the evidence shows that the Bay in the area of the proposed island is navigable, being from two to six feet in depth; it has been used for transportation of commerce and that the channel of the Intracoastal Waterway passes within three hundred feet of the said site; said Waterway being projected from Boston, Massachusetts to the Rio Grande River.

The evidence on this particular phase is summarized in Findings of Fact, Pars. IX to XII, inclusive, R. 21 to 23, thus:

IX

During the year 1925, when, due to the congested conditions on the railroads in Florida, an embargo against rail shipments was in effect, the Intracoastal Waterway, Jacksonville to Miami, was availed of to bring into Miami and vicinity building materials and merchandise from the north. This waterway, which then was five feet deep by 50 feet wide, and in some places the controlling depth but 3½ feet, passed close to the site of the proposed island. In that

year there passed through this waterway 703 thousand tons, of which 200,000 tons were shell, 440,000 tons rock.

In 1931 there was transported through this waterway from Miami to Ft. Lauderdale, Florida, minerals, oil and fuel amounting to 30,000 tons which came in tankers from the Gulf Coast and was transferred to barges. In that year 1,620 motor vessels drawing 5 feet and 366 barges traversed the waterway northbound; southbound, 1,620 motor vessels and 325 barges. In 1932, 38,529 vessels of drafts of 6 feet to 3, northbound, and the same number southbound; the total tonnage of these was 324,141; 28,041 were fishing boats of 66,413 tons; yachts, of five-foot draft, 10; four-foot draft, 125; three-foot draft, 215. Numerous fishing boats and shrimp boats operate from all these ports along the Florida ports and go outside to fish. They gather the fish and food there which comes to the shore to be shipped by rail to the northern markets. Pleasure boats from other states have traversed the waterway from Jacksonville to Miami.

X

In 1927 Congress authorized a channel 8 feet by 100 feet through Biscayne Bay as a part of the Intracoastal Waterway. In 1929 the rights of the Florida East Coast Canal Company, which constituted a part of the waterway north of Biscayne Bay, were transferred to the United States, whereupon the

government did maintenance dredging in that waterway, and opened it up all the way through to the St. John's River. Following that, began the improvement of the new waterway, 8 by 100 feet, and which was to have been completed shortly after the hearing in this case was held (November 1934).

XI

There has been projected and authorized by Congress what is known as "The Intracoastal Waterway, Boston, Massachusetts, to the Rio Grande." The channel through Biscayne Bay, Florida, is a part of that waterway. At the present time, the waterway from the Delaware River to Key West, Florida, is blocked only between Charleston, South Carolina, and Wilmington, North Carolina. That will be opened within the present year; this will produce a continuous intracoastal waterway from the Delaware River to Miami. The channel of this waterway in Biscayne Bay will pass about 300 feet from the site of the proposed island.

XII

In a report, dated January 23, 1923, of the District Engineer at Jacksonville, Florida, to the Chief of Engineers, on the subject of the then proposed larger intracoastal waterway from Jacksonville to Miami, it was said that the total value of exports in 1925 from the territory tributary to the waterway would amount to 30 million dollars; the ton-

nage inbound and outbound, 1,380,000, of a value of 70 million dollars.

This traffic could move over the waterway at a considerable saving in transportation costs as compared to rail rates.

The evidence supporting these findings is in the testimony of Colonel Hannum at R. 64-67; 68 (House Doc. No. 586, 69th Cong. 2nd Sess. Deft's Ex. C), R. 69 (Deft's Ex. D).

In the light of the foregoing evidence, showing transportation of commodities and property not only locally on this bay but also in interstate and foreign commerce, it is unquestionable that Biscayne Bay is navigable.

Being such, it is subject to the jurisdiction of the United States in the interest and for the protection of navigation. The power to regulate navigation is a power incidental to the express power given in the Constitution to regulate commerce. *Gibson v. U. S.*, 166 U. S. 269, 271, 272.

II

The Secretary of War had the power and authority to revoke the permit issued to LeGro Properties, Inc., and his action in so doing is not subject to review in the court, especially where the record of the hearings upon which he determined to revoke is not before the court

The power of the Federal Government over this body of water for the purposes indicated being established, the question now presented is as to the power of the Secretary of War.

The permit which issued to LeGro Properties, Inc., for construction of this proposed island was issued under the provisions of the Act of March 3, 1899, Sec. 10; 33 U. S. Code 403, which confers power upon the Secretary of War to authorize such construction.

The vesting of this power in the Secretary of War was a proper delegation, not subject to constitutional objection. *Union Bridge Co. v. U. S.*, 204 U. S. 364, 385-388; *Monongahela Bridge Co. v. U. S.*, 216 U. S. 177, 192, 193; *Sanitary District v. U. S.*, 266 U. S. 405, 428.

The permit was revocable

It will be observed that the permit contained a note at the head of the permit form, declaring that the instrument "does not give any property rights either in real estate or material, or any exclusive privileges; * * * It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation" (R. 83).

Among the conditions subject to which the permit was given were (R. 85, 86):

That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or of, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without

expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

That if the structure or work herein authorized is not completed on or before thirty-first day of December 1934, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

We, therefore, submit that by its terms, the permit indicates its revocable character. Not only so, but it has been declared both administratively and judicially that permits issued under Section 10 are revocable.

In an opinion to the Secretary of War, concerning the power of the Secretary in respect of the rebuilding of a wharf in Porto Rico, the Attorney General said, 23 Op. A. G. 551, 553:

It seems clear, from the nature and language of this instrument and from the law as to such grants, that the license is absolutely revocable at will by the Secretary

of War, whatever claims the licensee, in case of revocation, might found upon its terms. The matter of revocation, as between this Government and the licensee is wholly in your hands.

And in 34 Op. A. G. 410, the Attorney General advised the Secretary of War regarding his power to grant a permit for a diversion of water from Lake Michigan and concerning permits under Section 10, said, p. 418, 419:

In the exercise of such discretion you may conclude that under present circumstances the Sanitary District of Chicago should be permitted to take a greater quantity of water than that authorized by previous permits or required to take less. The previous permits given by your predecessors in this matter were expressly revocable in terms, and, even if this were not the case, their revocability would, in my judgment, be implied from the continuing duty of the United States to preserve the navigability of its water highways.

In *U. S. v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, the court considered, inter alia, the asserted rights of that Company to dams, dykes, and forebays placed by it in the St. Marys River, for the purpose of controlling the current and using the power for commercial purposes. These obstructions were placed in the river under permits from the Secretary of War. The Court characterized such permits as "revocable at will", (p. 68) and then said (*id.*):

What it did was by the revocable permission of the Secretary of War, and every such permit or license was revoked by the act of 1909. (See act of September 19, 1890, 26 Stat. at L. pp. 426, 454, chap. 907, forbidding the construction of any dam, pier, or breakwater in any navigable river without permission of the Secretary of War, or the creation of any obstruction, not affirmatively authorized by law, "to the navigable capacity of such rivers." See also the later act of March 3, 1899, 30 Stat. at L. pp. 1151, 1155, chap. 425, U. S. Comp. Stat. 1901, p. 3540, and *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770, construing and applying the act of 1890.) That it did not thereby acquire any right to maintain these constructions in the river longer than the government should continue the license needs no argument. They were placed in the river under a permit which the company knew was likely to be revoked at any time.

Again, in *Sanitary District v. U. S.*, 266 U. S. 405, speaking of permits issued under Section 10 of the Act of March 3, 1899, to the Sanitary District of Chicago to divert water from Lake Michigan, the Court said, p. 429:

After this statute (Sec. 10) was passed the Secretary of War granted various permits, which are relied on by the appellant although in their nature they were all revocable licenses.

That the LeGro Properties, Inc., the permittee, did not secure any vested right by the issuance of the permit is clear from the terms. All that the permit assumed to do or grant was the consent of the Government to the construction of the island. *Cummings v. Chicago*, 188 U. S. 410, 431.

Furthermore, the decisions involving action of the Secretary of War, under Section 11 of this same Act of March 3, 1899, 33 U. S. Code 404, in establishing and changing harbor lines furnish a rational and sound basis for holding that no vested rights accrued under the permit here involved.

In *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, the claim of vested right was made by the Company as a basis of a claim for compensation for the loss of its wharf or bulkhead which it was required to remove because of a change of harbor lines made by the Secretary of War. The Court said, p. 260:

In other words, the paramount right of navigation was decided to be superior to riparian rights or rights in the river; or, to put it more generally, to rights in the submerged lands. The case seems directly against complainant in the case at bar. Complainant asserts a right of compensation because it conformed to the harbor line as located by Virginia and by the United States; in other words, contends that it acquired a vested right. The case decides otherwise, and 200 U. S. 561, *supra*, so de-

cides. The proposition announced was that the power of the sovereign, state or national, is perpetual—not exhausted by one exercise—and all privileges granted in public waters are subject to it; and that the exercise of the power was not a taking of private property for a public use, but “the lawful exercise of a governmental power for the common good.”

So, also, in *Philadelphia Co. v. Stimson*, 223 U. S. 605, where the power of the Secretary to alter harbor lines was challenged, it was said, p. 638:

It must be concluded, therefore, that it was competent for Congress to provide for the establishment of the harbor lines in question for the protection of the harbor of Pittsburgh. It acted within its constitutional power in authorizing the Secretary of War to fix the lines. *Union Bridge Co. v. United States*, supra (pp. 385–388); *Monongahela Bridge Co. v. United States*, 216 U. S. (p. 192) 54 L. ed. 441, 30 Sup. Ct. Rep. 356. That officer did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction. And, in none of the acts complained of, did he exceed the power which had been conferred.

Since the permit was a revocable one, the Secretary had power to revoke it and no claim of vested rights could be interposed against that action.

The Secretary's action in revoking cannot be reviewed by the courts

Since as we have seen, the Federal power extends over navigable streams for the purposes specified, and as the delegation to the Secretary of War of the power given by Congress is valid, and as no vested rights are involved, it would appear clear that in a situation such as presented here, the Courts have no function. To "revoke the revocation" of the permit would require the Court to assume the function committed to the Secretary to issue a permit.

As the power over navigable waters is a continuing power, a single exertion of it in a particular case does not exhaust it as to that case.

But, even assuming for the argument that the court might review the action of the Secretary if it were arbitrary or unreasonable and without any reasonable basis, it is impossible to review it, since the court has not before it the record of the hearings, had by order of the Secretary, to determine whether the permit should be revoked. Without that record, the Court cannot say that there was no ground for revocation.

The applicable rule is that a claim that there was not substantial evidence to sustain an order, cannot be sustained in a court proceeding when the whole of the evidence before the tribunal whose action is assailed is not produced in court. *Spiller v. Atchison, T. & S. F. R. R. Co.* 253 U. S. 117, 125; *Louisiana & Pine Bluff Ry. Co. v. U. S.*, 257 U. S.

114, 116; *U. S. v. Tennessee*, 262 U. S. 318, 323, 324; *Chicago I. & L. Ry. Co. v. U. S.*, 270 U. S. 287, 295; *Mississippi Valley Barge Line Co. v. U. S.*, 292 U. S. 282, 286.

Furthermore, there is no allegation in the bill of complaint that there was no substantial evidence to support the order of revocation. The bill was not predicated upon that theory but on the proposition that there was no *power* to revoke.

We submit that the action of the Secretary of War in revoking the permit was within his power and may not be reviewed by the Court.

Appellant seeks to invoke a sort of estoppel against revocation due to expenditures claimed to have been made on the faith of the permit. The evidence adduced shows that most of these expenditures were made prior to the issuance of the permit and prior to the incorporation of appellant and many of the items were of corporate organization expenses or maintenance. Nothing was spent on construction work (Test. of Smoot R. 44, 53). Plaintiff's Exhibit 5, "Statement of plaintiff's expenses", (R. 44) is not in the record on appeal.

But in any event, the permit gave no vested rights and no estoppel can be raised against revocation of the permit in view of its character. *Greenleaf Lumber Co. v. Garrison*, *supra*; *Sanitary District v. Chicago*, *supra*.

Some testimony was adduced showing that the government was having dredging done in the area

of the site of the proposed island; that this work resulted in creating obstructions in that part of the bay (R. 46, 48).

Just what the purpose of such evidence was, is not clear. Certainly operations under a contract entered into more than a year after the permit in this case was revoked have no bearing on the question of the power of the Secretary to revoke.

CONCLUSION

The decree below was right and should be affirmed.

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